APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1972~~ 1973

72-1019

NO. A-534

HELEN STEIN GAUDET, ADMINISTRATRIX
OF THE ESTATE OF AWTREY C. GAUDET, SR.,

Appellees

versus

SEA-LAND SERVICES, INC.,

Appellant

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED
January 22, 1973

CERTIORARI GRANTED
May 7, 1973

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STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX NO. 1

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

AWTREY C. GAUDET	CIVIL ACTION
AGAINST	IN ADMIRALTY
SEA-LAND SERVICES, INC.	NO. 67-1276
	SECTION G

COMPLAINT

I

That at all times hereinafter mentioned, the plaintiff was and still is, a citizen of the State of Louisiana, and residing at 4722 Good Drive, New Orleans, Louisiana; defendant is a corporation organized under the laws of and domiciled in the State of New Jersey.

II

At all times mentioned herein, the defendant was, and still is, the owner and operator of the S/S CLAIBORNE, which at the time of the occurrence herein was a merchant ship, said vessel can now be found or during the pendency of this action will be within the Port of New Orleans and within the territorial jurisdiction of the United States.

III

That the plaintiff was employed as a longshoreman aboard said vessel, which was docked in the Mississippi River on October 29, 1966 on the navigable waters of the

United States in the City of New Orleans, State of Louisiana.

IV

That at the time and place mentioned above, plaintiff was going about his duties as a longshoreman when he slipped, coming from a tier of cargo, injuring his back.

V

That the accident and resulting injury was caused by the unseaworthiness of the S/S CLAIBORNE in that it was not provided with ladders to go from tier to deck and the deck was greasy.

That prior to these injuries, plaintiff was a strong, able-bodied man gainfully employed and capable of earning in excess of One Hundred ($100.00) Dollars per week. As a result of these injuries, plaintiff has been unable to pursue his occupation with the same degree of proficiency and he has sustained permanent disability, has suffered physical agony and will continue to do so and has suffered loss of wages and will continue to do so.

WHEREFORE, plaintiff demands judgment against Sea-Land Services, Inc. in the full sum of Two Hundred and Fifty Thousand ($250,000.00) Dollars.

Please Serve
Defendant:
Sea-Land Services,
Inc., through
Secretary of State

REESE & ABADIE
PETER J. ABADIE, JR.
ATTORNEYS FOR PLAINTIFF
627 N.B.C. BLDG. 523-1953
NEW ORLEANS 70112

APPENDIX NO. 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

AWTREY C. GAUDET	CIVIL ACTION
versus	NO. 67-1276
SEA-LAND SERVICES, INC.	SECTION "C"

Filed: June 25, 4:11 p.m.,1970

J U D G M E N T

Considering the answers returned by the jury herein, to the interrogatories propounded to it by the Court on June 23,1970, and considering the direction of the Court as to the entry of judgment;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein, in favor of plaintiff, Awtrey C. Gaudet, and against defendant, Sea-Land Services, Inc., in the sum of $140,000.00 and costs.

Dated at New Orleans, Louisiana, this 25th day of June, 1970.

Benjamin W. Reisch
BENJAMIN W. REISCH,Clerk

By /s/ Nelson B. Jones
Nelson B. Jones, Chief
Deputy Clerk

Approved as
to form:

/s/ Alvin B. Rubin
UNITED STATES DISTRICT JUDGE

George W. Reese, Esq.
Andrew T. Martinez, Esq.
Stuart A. McClendon, Esq.

APPENDIX NO. 3

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

HELEN STEIN GAUDET, ADMINISTRATRIX OF THE ESTATE OF AWTREY C. GAUDET, SR. — CIVIL ACTION 70-3035

AGAINST — SECTION B

SEA-LAND SERVICES, INC.

COMPLAINT

Plaintiff is domiciled in the State of Louisiana and is the administratrix of the estate of Awtrey C. Gaudet, Sr., and resides at 4722 Good Drive, New Orleans, Louisiana; defendant is a corporation organized under the laws of and domiciled in the State of New Jersey. The matter in controversy exceeds $1,000.00 exclusive of interest and costs.

II.

At all times mentioned herein, the defendant was, and still is, the owner and operator of the S/S Claiborne, which at the time of the occurrence herein was a merchant ship, said vessel can now be found or during the pendency of this action will be within the Port of New Orleans and within the territorial jurisdiction of the United States

III.

That Awtrey C. Gaudet, Sr. was employed as a longshoreman aboard said vessel, which

was docked in the Mississippi River on October 29, 1966 on the navigable waters of the United States in the City of New Orleans, State of Louisiana.

IV.

That at the time and place mentioned above, Awtrey C. Gaudet, Sr. was going about his duties as a longshoreman when he slipped, coming from a tier of cargo, injuring his back.

V.

That the accident and resulting injury was caused by the unseaworthiness of the S/S Claiborne in that it was not provided with ladders to go from tier to deck and the deck was greasy.

VI.

That plaintiff was dependant for support on the said Awtrey C. Gaudet, Sr. and that as a result of the injuries and treatment resulting therefrom described in Paragraph IV, the said Awtrey C. Gaudet died on June 29, 1970.

VII.

That as a result of the death of Awtrey C. Gaudet, Sr. plaintiff suffered severe financial loss.

VIII.

That the unseaworthiness of the said S/S CLAIBORNE as described in Paragraph V of this Complaint has already been decided

by a judgment of this Court and is now res judicata.

WHEREFORE, plaintiff demands judgment against Sea-Land Services, Inc. in the full sum of TWO HUNDRED and FIFTH THOUSAND ($250,000.00) DOLLARS.

REESE & ABADIE
GEORGE W. REESE
Attorney for Plaintiff
627 NBC Building
523-1953
New Orleans 70112

PLEASE SERVE DEFENDANT:

Sea-Land Services, Inc.
Through Secretary of State

APPENDIX NO. 4

The Minute Entry of the United States District Court, Eastern District of Louisiana, dismissing the Complaint of Helen Stein Gaudet in Case No. 70-3035 has been included in Appellant's Petition for Writ of Certiorari as Appendix "A".

APPENDIX NO. 5

The Opinion of the United States Court of Appeals for the Fifth Circuit has been included in Appellant's Petition for Writ of Certiorari as Appendix "B".

APPENDIX NO. 6

The Order Denying Rehearing by the United States Court of Appeals for the Fifth Circuit has been included in Appellant's Petition for Writ of Certiorari as Appendix "C".

72-1019

IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. A-534

HELEN STEIN GAUDET, Administratrix of THE ESTATE OF AWTREY C. GAUDET, SR.,

Plaintiff-Appellee,

versus

SEA-LAND SERVICES, INC.,

Defendant-Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. A-534

HELEN STEIN GAUDET, Administratrix of THE ESTATE OF AWTREY C. GAUDET, SR.,

Plaintiff-Appellee,

versus

SEA-LAND SERVICES, INC.,

Defendant-Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Sea-Land Services, Inc., defendants, pray that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on August 3, 1972, petition for rehearing denied on August 24, 1972.

OPINION BELOW

The minute entry of the United States District Court for the Eastern District of Louisiana dismissing the plaintiff's claim on the grounds of res judicata and for failure to state a claim upon which relief can be

granted is printed in Appendix A hereto and there is no opinion of that Court.

The opinion of the United States Court of Appeals for the Fifth Circuit which reversed and remanded the judgment of the United States District Court for the Eastern District of Louisiana is printed in Appendix B and is reported at 463 F. 2d 1331.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28, Section 1254(1) United States Code.

QUESTIONS PRESENTED

(1) Does recovery during the lifetime of a decedent under General Maritime Law for injuries preclude the survivors of decedent from instituting further claims for pecuniary loss resulting from the death of decedent?

(2) Do the survivors have a separate cause of action for pecuniary loss for death under General Maritime Law when the deceased, before his death has reduced his claim for pecuniary loss to judgment?

(3) Has the traditional refusal to award damages for loss of love and affection, society companionship and loss of consortium under General Maritime Law, the Jones Act and the Death on the High Seas Act been changed by the Supreme Court in their decision in MORAGNE VS STATES MARINE LINES?

(4) Is the uniformity intended by MORAGNE VS STATES MARINE LINES in fact destroyed by allowing damages for non pecuniary losses whereas the Jones Act and the Death on the High Seas Act have not traditionally

allowed such recovery?

(5) Is not the defendant deprived of his property without due process of law when the survivors of an injured party are allowed to present a new claim for pecuniary loss despite the fact that during his lifetime the decedent reduced his claim for pecuniary loss to a final judgment from a court of competent jurisdiction?

(6) Since the award to decedent before his death included pecuniary loss and anticipated all losses resulting from the accident, are not his survivors then restricted to recovery for non pecuniary damages (i.e., loss of love and affection, society, companionship and loss of consortium) which damages have never been allowed under the Jones Act, Death on the High Seas Act or General Maritime Law?

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MISCELLANEOUS:	
39 ALR 579 (1925)	7
50 Corpus Juris Secundum § 592	11

STATEMENT OF THE CASE

The facts necessary to place in their setting the questions now raised can be briefly stated:

On October 29, 1966 Awtrey C. Gaudet, Sr. was injured on board the S/S CLAIBORNE, a vessel in navigable waters within the territorial limits of the State of Louisiana. After injury, suit was instituted by Awtrey C. Gaudet, Sr. in the United States District Court, Eastern District of Louisiana, which culminated in a jury verdict for Mr. Gaudet, Sr. with an award of $175,000.00 to be reduced by 20% for contributory negligence.

Ten days after the jury award Mr. Gaudet, Sr. died and thereafter his widow,Helen Stein Gaudet, was substituted in this first case to defend post-trial motion and to answer the appeal.

In the appeal of the original suit Mrs. Gaudet did not amend her answer to the defendant's appeal or request additional payment for financial loss due to her husband's death, and in effect acknowledged that she had recovered for the financial loss incurred. On June 24, 1970 Mrs. Gaudet was paid the sum of $131,000.00 which represents payment for severe financial loss by any reasonable standard.

Subsequently, this second suit was filed in the United States District Court, Eastern District of Louisiana by the widow of the deceased, alleging financial loss resulting from her husband's death, which she alleged was a result of the original accident of October 1966.

The defendant, Sea-Land Services, Inc., moved to dismiss the widow's claim for financial loss on the grounds of res judicata and for failure to state a claim upon which relief can be granted.

On October 29, 1971 after oral argument and consideration of supporting memorandums, the United States District Court granted the defendant's motion to dismiss.

The United States Court of Appeals for the Fifth Circuit, on August 3, 1972, reversed and remanded the case to the District Court and indicated that the deceased's recovery for his personal injuries and financial loss prior to his death did not bar Mrs. Gaudet's wrongful death action to recover for her financial loss.

The Court of Appeals acknowledged, in footnote 1 of their opinion, the possibility of double recovery but did not go forward to distinguish pecuniary from non-pecuniary losses and the recoverability by Mrs. Gaudet of non-pecuniary losses.

On August 24, 1972 the United States Court of Appeals for the Fifth Circuit denied the defendant's Petition for Rehearing. No opinion was rendered in connection with the denial of a rehearing.

On November 20, 1972 the Supreme Court of the United States granted a sixty-day extension to defendant to file the Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I

The United States Court of Appeals for the Fifth Circuit has created a conflict between recovery under General Maritime Law, the Jones Act and Death On The High Seas Act by allowing recovery for loss of love and affection, society, companionship and loss of consortium under the General Maritime Law in death cases whereas it has never been allowed under cases arising under the Jones Act or the Death On The High Seas Act.

Only one cause of action arose at the time of Awtrey Gaudet's accident on October 29, 1966. Two rights of action arose at that time; first, the right of Gaudet to prosecute his claim for personal injuries and resulting financial loss and, second, the right of Gaudet's survivors to prosecute the claim in the event Gaudet failed to prosecute it during his lifetime. The law allows only one right of action to be exercised, and since it was exercised by Gaudet during his lifetime, then no right of action was inherited by his survivors to present Gaudet's claim for financial loss.

At the time of Mr. Gaudet's death, one cause of action and one right of action came into existence insofar as claiming that the death resulted from the accident of October 29, 1966. That was the right of Gaudet's survivors to claim non pecuniary loss including loss of love and affection, society, companionship and loss of consortium.

The Fifth Circuit, in reversing the ruling of the trial court has in effect allowed recovery for non pecuniary losses to the survivors which recovery is contrary to General

Maritime Law. See Simpson v. Knutsen, 444 F. 2d 523 (9th Cir. 1971); Green v. Ross, 338 F. Supp. 356 (S.D. Fla. 1972); Dennis v. Central Gulf Steamship Corp. 453 F. 2d 137, 140 (5th Cir. 1972); Smith v. Olsen and Ugelstad, 324 F. Supp. 578 (E. D. Mich. 1971); Mugin v. Calmar Steamship Corporation, 342 F. Supp. 479 (D. Md. 1972) and Mascuilli v. United States 343 F. Supp. 439 (E. D. Pa. 1972).

The recent Louisiana case of Strickland vs Nutt, 264 So. 2d. 317 (1st Cir. 1972) is consistent with this view in denying recovery for non financial loss under General Maritime Law.

II

The Fifth Circuit has created a conflict with the Third Circuit case of Roberts vs. Union Carbide 415 F. 2d. 474 (1969).

In the case of Roberts vs. Union Carbide 415 F. 2d. 474 (3d Cir. 1969), plaintiff obtained judgment for Two Hundred and Ten Thousand ($210,000.00) Dollars for personal injuries. Five years after the accident decedent died and his survivors brought suit against the same defendant alleging that the prior accident was the cause of death. In affirming the trial court's dismissal of the matter, the Third Circuit stated:

> "The plaintiff's cause of action is barred and extinguished by the decedent's having obtained recovery during his lifetime."

The Court observed that this view is consistent with that of nearly all states having similar statutes and also referred to the annotation in 39 ALR 579 (1925).

The Fifth Circuit also cited Mellon vs. Goodyear 277 U. S. 335, 48 S. Ct. (1928), Flynn vs. New York, N. H. & H. R. Co. 283 U.S. 53, 51 S. Ct. 357 (1931) and Walrod vs. Southern Pacific 447 F. 2d. 930 (9th Cir. 1971) with approval.

The Supreme Court in Moragne suggested that cases in other areas of law should be employed to resolve questions raised but not answered by Moragne (398 U. S. at 391 and 392), however the Fifth Circuit has refused to follow clearly established rules in similar fields of law. These cases held that a decedent's recovery of damages for injuries which resulted in his death is a bar to an action by his personal representative for wrongful death if the decedent in his lifetime made a valid settlement for the injuries which resulted in his death. The Fifth Circuit in the Gaudet case has reached a different conclusion and has found that the recovery during decedent's lifetime is not a bar to his survivor's coming back into court for additional damages. This conflict should be resolved by the United States Supreme Court so that harmony and uniformity will prevail among the Circuits and so that the rights of litigants will be more clearly defined.

III

The United States Court of Appeals for the Fifth Circuit has misunderstood the intent of the United States Supreme Court in the case of Moragne vs. States Marine Lines, 398 U. S. 375 (1970) and has in effect undermined the finality of recoveries by settlement or judgment for personal injuries and opened the door for survivors to come back into court years later after the death of the decedent requesting additional damages for financial loss.

Before the Moragne decision there was no remedy for Moragne's widow and the Supreme Court, seeing the injustice and failure of the General Maritime Law to provide a remedy, reversed the harsh rule of the Harrisburg 119 U.S. 199 and gave the widow a cause and right of action to recover for the financial loss resulting from her husband's death. In Gaudet, however, Gaudet himself had filed suit and taken his case to judgment before his death. The Fifth Circuit is treating the Gaudet case as if no judgment had in fact been obtained and as if Gaudet had not in fact taken any steps to preserve his rights during his lifetime. In the closing sentence of the opinion the Fifth Circuit states:

> "We hold that such an action (for wrongful death) is not one that can be sued out, sold out, compromised or lost by the deceased's actions or inaction before it ever comes into being."

The Court also states that Mr. Gaudet had a cause of action immediately before his death. The Court, it is submitted, is mistaken in this statement for the cause of action for his injuries had been reduced to a judgment which judgment had become a property right and which was inherited by the survivors following his death.

We submit that the case of Mellon vs. Goodyear, 277 U. S. 335 (1928) enunciates principals of law which are applicable here. In the Gaudet decision the Court quoted from the Mellon case at page 344:

> "By the overwhelming weight of judicial authority where a statute of the nature of Lloyd Campbell's Act in effect gives a right to recover damages for the benefit of dependents,

> the remedy depends upon the existence in the decedent at the time of his death of a right of action to recover for such injury". (Emphasis added).

However, the Fifth Circuit failed to quote the next sentence from the decision, which continues the thought and makes a closer application to Gaudet:

> "A settlement by the wrongdoer with the injured person, in the absence of fraud or mistake, precludes any remedy by the personal representative based upon the same wrongful act". (Emphasis added).
> Mellon v. Goodyear, 277 U. S. at 344.

Therefore, there was no longer any remedy at the time of decedent's death or thereafter for this right had been extinguished.

See also the case of Flynn vs. New York, N. H. & H. R. Co., 283 U. S. 53, (1931) where decedent was injured in 1923, died in 1928, and his executor brought a wrongful death action in 1929. Mr. Justice Holmes, speaking for the Court said:

> "Obviously Flynn's right of action was barred, but it is argued that the right on behalf of the widow and children is distinct; that their cause of action could not arise until Flynn's death, and that therefore the two years did not begin to run until September 1, 1928. But the argument comes too late. It is established that the present right, although not strictly representative, is derivative and dependent upon the continuance of a right in the injured

> employee at the time of his death. On this ground an effective release by the employee makes it impossible for his administrator to recover. The running of the two years from the time when his cause of action accrued extinguishes it as effectively as a release, Engel v. Davenport, 271 U. S. 33, 38, 46 S. Ct. 410, 70 L. Ed. 813, and the same consequence follows * * *" (Emphasis added.) 283 U.S. at 56, 51 S. Ct. at 358.

The Honorable Judge Alvin B. Rubin's comments at the motion for new trial following the death of the decedent are most appropriate here, as they reflect the well established rule that after a final judgment, neither the plaintiff can come back for more nor can the defendant request a reduction due to facts occurring subsequent to the judgment.

> "Now I know and am about to say with respect to damages that we judge all things as of the date of the trial, we can't reopen damages we all know, the Jurisprudence is voluminous for post trial events. The plaintiff gets Ten Thousand Dollars because everybody thinks his injury is minor and then he goes to have it operated on and it proves fatal, he dies. We can't come back and have a new day in Court.
>
> When you die, the widow comes to Court and goes out the day after she gets the award and marries a rich man who had been courting her all along; these are historic problems and the jury says, and I don't think we can reopen with respect to damages for what happens afterward

either way." (Transcript p. 408).

See also the case of Schlavick vs. Manhatten Brewing Company, 103 F. Supp. 744 (ND Ill.) (1952). The Court stated in Schlavick as follows:

> "A decedent's recovery of damages for injuries, which resulted in his death, is a bar to an action by his personal representative for wrongful death."
>
> "An action by a personal representative for the wrongful death of his decedent will be barred if such decedent in his lifetime made a valid settlement for the injuries which resulted in his death."

IV

The protective application of the doctrine of Res Judicata has been undermined by the United States Court of Appeals for the Fifth Circuit.

The Court should take note of the fact that the language in the suit brought by the widow was identical to the language in the suit brought by plaintiff before his death. Both pleadings claim that "severe financial loss" was caused by the accident and the death of decedent.

In the action filed by the widow, no request is made for damages for non pecuniary loss such as loss of love and affection, companionship and loss of consortium. The only allegation of damage is that the widow suffered "severe financial loss".

Claimant died ten days following the jury award of $175,000.00. Plaintiff did

not file for a new trial requesting that the question of damages be reopened so that damages arising out of the death of decedent could be included in the judgment. Counsel for decedent's survivors was well aware of the prohibition against such a request. On appeal of the first case, counsel for claimant did not request enlargement of the judgment due to the death of the decedent nor were any allegations made at any time that the award was inadequate or should be amended. Rather on June 24, 1970, she accepted the sum of $131,000.00 in full satisfaction of the judgment and then instituted the claim for wrongful death upon which this appeal is based.

Two conditions must be met in order for the exception of Res Judicata to apply:

1. "The judgment or decree of a Court of competent jurisdiction on the merits precludes the parties and their privies to the litigation and constitutes a bar to a new action or suit involving the same cause of action either before the same or any other tribunal, and

2. Any right, fact or matter in issue, and directly adjudicated on or necessarily involved in the determination of an action before a competent Court in which a judgment or decree is rendered on the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and their privies whether or not the claim or demand, purpose or subject matter of the two suits is the same. Vol. 50 Corpus Juris Secundum, Sec. 592, P. 11. (Emphasis supplied).

We submit that the second suit by the widow meets all of the essential elements necessary to invoke the doctrine of Res Judicata.

The widow of the deceased cannot recover again for loss of future earnings which the deceased would have earned had he lived, as his recovery in the first case included the loss of earnings, past and future. Allowance of such recovery would compensate the widow twice for the identical elements of damage. The allegations of the pleadings are identical and again the widow is requesting payment for "severe financial loss". The widow is seeking the proverbial pound of flesh, which the Court has no power to grant.

Should Mr. Gaudet never have filed suit for damages resulting from the accident, we do not dispute the right of his survivor to have done so. However, those "potential rights of his survivors were extinguished when he brought the first suit and subsequently obtained a jury award. The judgment obtained by Mr. Gaudet before his death was inherited as a property right by his widow. She has no right to enlarge it.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

McCLENDON, GREENLAND & DENKMAN

By: _____

WILLIAM H. McCLENDON, JR.
3301 North Causeway Blvd.
Metairie, La. 70002
Telephone: 837-2144
Attorneys for defendant,
Sea-Land Services, Inc.

PROOF OF SERVICE

I, William H. McClendon, Jr., attorney for defendant and a member of the bar of the Supreme Court of the United States, hereby certify that on this day, I have served copies of the foregoing application for writs on:

GEORGE W. REESE, Attorney
627 National Bank of Commerce
New Orleans, Louisiana 70112

by mailing a copy thereof, postage prepaid addressed to their respective offices, this 19th day of January, 1973.

WILLIAM H. McCLENDON, JR.

APPENDIX "A"

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MINUTE ENTRY

Filed: October 29, 1971

October 28, 1971
Heebe, J.

Helen Stein Gaudet, Administratrix of the Estate of Awtrey C. Gaudet, Sr.

versus

Civil Action
No. 70-3035
Section B

Sea-Land Services, Inc.

This cause came on for hearing on a previous day on the motion of defendant, Sea-Land Services, Inc., to dismiss on grounds of res judicata and for failure to state a claim upon which relief can be granted.

The Court, having heard the arguments of counsel and having studied the legal memoranda submitted by the parties, is now fully advised in the premises and ready to rule. Accordingly,

IT IS THE ORDER OF THE COURT that the motion of defendant, Sea-Land Services, Inc., to dismiss on grounds of res judicata and for failure to state a claim upon which relief can be granted, be, and the same is hereby, GRANTED.

(Signed) FREDERICK J. R. HEEBE

George W. Reese, Esq.
Stuart McClendon, Esq.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-3517

HELEN STEIN GAUDET, Administratrix of
THE ESTATE OF AWTREY C. GAUDET, SR.,
Plaintiff-Appellant,

versus

SEA-LAND SERVICES, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

(August 3, 1972)

Before BROWN, Chief Judge, RIVES and CLARK, Circuit Judges.

CLARK, Circuit Judge: The Albatross inherent in the vagaries and vicissitudes of right and remedy under differing state wrongful death statutes has been lifted from the Mariner's neck. *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, ____ L.Ed.2d ____ (1970). Though the reckoning of the Supreme Court predicts this course will steer the Mariner into "more placid waters," *Moragne* at 408, they are waters

which remain uncharted. Today we map at least part of them.

Helen Gaudet filed a complaint against Sea-Land Services, Inc. to recover damages for the wrongful death of her husband which allegedly resulted from injuries he had received aboard a Sea-Land vessel. During his lifetime, Mr. Gaudet sought personal recovery for these same injuries. Ten days before his death he obtained a favorable judgment based upon a jury verdict for 175,000 dollars (to be reduced by 20 per cent for contributory negligence). Mrs. Gaudet was substituted for Mr. Gaudet in the action in order to respond to post-trial motions and to answer the appeal. *Helen Stein, Widow and Administratrix v. Sea-Land Services, Inc.*, ____ F.2d ____ (5th Cir. 1971) [No. 30525, March 29, 1971]. The judgment was subsequently affirmed by this court and was satisfied by payment to Mr. Gaudet's estate. Thereafter Mrs. Gaudet brought the present suit claiming financial losses due her as a result of Mr. Gaudet's death. The court below granted Sea-Land's motion to dismiss on the grounds of res judicata and failure to state a claim upon which relief could be granted. Because we hold that Mrs. Gaudet retained a compensable cause of action for Mr. Gaudet's death wholly apart from and not extinguished by the latter's recovery for his personal injuries, we reverse.

As this suit is one brought in admiralty for wrongful death upon a state's territorial waters (Louisiana), whether or not it should be barred by the decedent's prior recovery is now a question of federal maritime law. Its resolution is part of that "further sifting

through the lower courts" envisioned by the Supreme Court in *Moragne*, at 409, and is a function of our responsibility for fashioning the controlling rules of this newly-created maritime action. *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20 (1963). Such a role is not novel; admiralty law has for some time been "primarily judge-made law." *The Tungus v. Skovgaard*, 358 U.S. 588, 611 (1959); *Fredelos v. Merritt-Chapman & Scott Corporation*, 447 F.2d 435, 438-40 (5th Cir. 1972); *see* Landis, *Statutes and the Sources of Law*, in Harvard Legal Essays 213, 226-27 (1934); Note, *Maritime Wrongful Death After Moragne: The Seaman's Legal Lifeboat*, 59 Geo.L.J. 1411, 1420 (1971). However, we have neither the intention nor the need to weave out of whole cloth a new suit in which to clothe this previously unrecognized cause of action; we have but to piece together the materials that are already available, *e.g.*, the general maritime law, personal-injury cases, state wrongful death statutes, and the Death on the High Seas Act, by a pattern that complements the purposes designed by the Supreme Court in *Moragne*.

Sea-Land puts forth two basic arguments to support its contention that the maritime wrongful death action ought not be available in this case. It first maintains that Mrs. Gaudet is attempting to recover twice for the same wrongful act; that this is the second identical claim for the same injuries; and that to sustain the claim would permit double recovery. But this is not true. The personal injury and wrongful death suits assert two distinct causes of action designed to compensate for two separate losses — the first for the loss and suffering of the injured while he lived, and the

second for the losses to his beneficiaries on account of his death. *Baltimore & Ohio S.W. Ry. v. Carroll*, 280 U.S. 491, 50 S.Ct. 182 (1930); *Michigan Central Ry. v. Vreeland*, 227 U.S. 59, 33 S.Ct. 192 (1913). Damage elements in the first generally include pain and suffering, medical expenses, and loss of earnings. But the second entails, though it is not always limited to, loss of support, loss of services (including society, care, and attention), loss of love and affection, grief or mental suffering of the survivors, and funeral expenses. *See generally*, Prosser, Law of Torts, pp. 927-32; Demos, *Measure of Damages — Wrongful Death*, 60 Ill. B.J. 518 (1972). Quite obviously, the jury verdict recovered by Mr. Gaudet during his lifetime did not include damages done to others by his death which had not yet occurred.[1] As the Supreme Court said in the *Carroll* case, *supra*, at 494:

> Although originating in the same wrongful act or neglect, the two claims [personal injury and wrongful death] are quite distinct, no part of either being embraced in the other. . . . One begins where the other ends, and a recovery upon both in the same action is not a double wrong. St. Louis, Iron M & S Ry. Co. v. Craft,

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[1]Mrs. Gaudet concedes that a possibility of double recovery does exist in that Mr. Gaudet's prior compensation for loss of future wages, and her own anticipated compensation for loss of support each represents the same funds and ought not to be twice paid. We commit to the discretion of the trial court the task of making an appropriate deduction from or accommodation of any judgment to which Mrs. Gaudet might otherwise be entitled, to insure that no double recovery results. *Cf.* Billiot v. Sewart, 382 F.2d 662 (5th Cir. 1967); Prosser, *supra*, at 934-35.

237 U.S. 648, 658, 35 S.Ct. 704, 706, 59 L.Ed. 1160 (1915).

We intimate nothing as to the possibility of Mrs. Gaudet proving any of the possible damage elements listed above, nor which of them should be includible in this federal maritime action. *See* 25 Ark.L.Rev. 510 (1972). We note only that some of these elements have already been specifically recognized as compensable, *Dennis v. Central Gulf Steamship Corporation*, 453 F.2d 137 (5th Cir. 1972); *In re* Sincere Navigation Corp., 329 F. Supp. 652 (E.D. La. 1971), and were not part of Mr. Gaudet's recovery. We conclude, then, that Mrs. Gaudet's suit is not res judicata and such further wrongful death compensation as she might receive will not be part of a twice-told tale.

Sea-Land's second ground for dismissal is more trouble-some. Relying upon what all parties concede to be the "majority role," it is argued that:

> ... where the statute in effect gives a remedy to recover damages where the death of a person is caused by the negligent or wrongful act of another, *such remedy depends upon the existence in the decedent, at the time of death, of a right of action to recover damages for such injury;* hence, if by a recovery of a judgment for damages due to the injury, or by a settlement with the wrongdoer, the injured person releases his cause of action, such release, in the absence of fraud or mistake, will preclude a recovery by his personal representative of damages based upon the same negli-

> gent or wrongful act. (emphasis supplied). Annot., 39 A.L.R. 579 (1925); *accord*, 22 Am.Jur.2d *Death* § 90 (1965); 25 C.J.S. *Death* § 49; Prosser, Law of Torts 932 (3d ed. 1964).

For several reasons, we refuse to hold that this rule should operate to bar Mrs. Gaudet's wrongful death action.

First, we note that a substantial number of those cases which foreclosed relief to a decedent's beneficiaries whenever the decedent himself had already recovered for his own injuries were based on "survival-type" rather than "true" wrongful death statutes. *See, e.g., Schlavick v. Manhattan Drilling Co.*, 103 F.Supp. 744 (N.D. Ill. 1952), a case on which Sea-Land relies, and the text in 22 Am.Jur.2d *supra*. Such survival statutes merely preserve for a decedent's beneficiaries a cause he himself had at death but had never pursued. However, the wrongful death action Mrs. Gaudet now attempts to bring never belonged to Mr. Gaudet and in fact did not even accrue until his death. *Baltimore & Ohio S.W.Ry. v. Carroll, supra* at 495. Having recognized these important distinctions, the Louisiana state courts, wherein Mrs. Gaudet's action *would have been permitted*, have reasoned:

> Where, however, a cause of action does arise, and the injured person has a period of suffering and expense, there seems no reason that he should not be able, while living, to make an adjustment of his claim with defendant which would bar a recovery by his beneficiaries after his death upon the same claim.

> But the action given under other than survival statutes is entirely distinct from the action which deceased had at the moment prior to his death. It is an action for damages arising from the mere fact of death, not damages to the deceased, but damages to his successors under the statute. Therefore, we cannot comprehend the reasoning which enables an injured person to release a cause of action which has not accrued, and cannot accrue until his death, and which then accrues to third persons. It would be necessary to support such a conclusion that we admit that a person has a right of action for his own death.
> Johnson v. Sundbery, 150 So. 299, 301 (La.App. 1933). *Accord*, Gilmore v. Southern Ry., 229 F.Supp. 198, 200-01 (E.D. La. 1964).

We concur in this analysis. *Accord, Montellier v. United States*, 315 F.2d 180 (2nd Cir. 1963); *Brown v. Moore*, 247 F.2d 711 (3rd Cir. 1957), *cert. denied*, 355 U.S. 882, 78 S.Ct. 148, *Wilson v. Massengill*, 124 F.2d 666 (6th Cir. 1942), *cert. denied*, 316 U.S. 711, 62 S.Ct. 1274; *see Ruditis v. Gallop*, 269 F.2d 50 (8th Cir. 1959); *Kroger Grocery & Baking Co. v. Reddin*, 128 F.2d 787 (8th Cir. 1942); *Puget Sound Traction Light & Power Co. v. Frescoln*, 245 F. 301 (1917).

Second, even were the majority rule supported exclusively by cases interpreting "true" wrongful death statutes, i.e., those that establish a new, not a revived cause of action, we would still decline to follow it. In establishing a uniform rule for the operation of the wrongful death suit in admiralty, we have both the

authority and the responsibility to espouse a minority rule if it better serves the purposes of the action. Here it does. We have not overlooked the fact that Lord Campbell's Act,[2] the original wrongful death statute, contained an express provision limiting the death action to those cases where the deceased could have recovered damages if he had lived. Rather, we are in complete accord with Prosser's observation that:

> It is not at all clear ... that such provisions of the death acts ever were intended to prevent recovery where the deceased once had a cause of action, but it was terminated before his death. The more reasonable interpretation would seem to be that they are directed at the necessity of some original tort on the part of the defendant, under circumstances giving rise to liability in the first instance, rather than to subsequent changes in the situation affecting only the interests of the decedent. Prosser, *supra* at 933.

Thus, we are persuaded that such language means no more than that if the wrongful act of a defendant which allegedly caused death was itself an actionable tort, a wrongful death claim may be stated.

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2 9 & 10 Vict., ch. 93: '... That whensoever the Death of a Person shall be caused by wrongful Act, Neglect or Default, and the Act, Neglect or Default is such as would (if Death had not ensued) have entitled the Party injured to maintain an Action and recover Damages in respect thereof, then and in every such Case the Person who would have been liable if Death had not ensued shall be liable to an Action for Damages, notwithstanding the Death of the Person injured.'

Nevertheless, even under the more restrictive majority interpretation of the Lord Campbell's Act language, we think Mrs. Gaudet stated a claim: Mr. Gaudet did have a cause of action immediately before death. At that moment, his right to collect damages for his personal injuries was very much alive, viable, and pending. In no sense could that right be said to have been already extinguished on the day he died. Indeed, the Death on the High Seas Act, the only federal statute designed exclusively to compensate wrongful death in admiralty, explicitly provides for the right of a beneficiary to bring a wrongful death action where the decedent's personal injury action is pending at death. 46 U.S.C.A. § 765.[3] That section takes note of but one example of the broader principle we specifically hold today: when an injured seaman dies, his widow's wrongful death action does not die with him.

Finally, and most importantly to this court, we cannot interpret *Moragne* as having created a wrongful death action in admiralty, at long last, only for the families of those decedents who failed to recover for their own injuries during life. The High Court in that case clearly recognized that the breach of a primary

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[3] If a person die as the result of such wrongful act, neglect, or default as is mentioned in section 761 of this title during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of the compensation provided in section 762 of this title.

duty to a mariner which causes both injury and death results in two separate harms:

> . . . in the case of mere injury, the person physically harmed is made whole for his harm, while in the case of death, those closest to him — usually spouse and children — seek to recover for their total loss of one on whom they depended. *Id.* at 382.

We refuse to now hold that such a "total loss" is to go uncompensated on the wholly arbitrary rationale that the injured person has already sued for or recovered for his *separate damages*.

It is unquestioned in some cases that both the decedent's damages and the beneficiaries' damages can be recovered. We have recently approved the combining of a state survival action with a Death on the High Seas action so that both recoveries may be obtained. *Dennis v. Central Gulf Steamship Corp.*, *supra* at 140; *accord, Dugas v. National Aircraft Corp.*, 438 F.2d 1386 (3rd Cir. 1971); Petition of Gulf Oil Corp., 172 F.Supp. 911 (S.D.N.Y. 1959); *see Kernan v. American Dredging Co.*, 355 U.S. 426, 431, *n.* 4. Are we now to conclude that both recoveries are available only where neither is sought before death? Is the rule to be that a man may bring suit to ameliorate his pain and suffering and lost wages, but only at the risk of sacrificing his beneficiaries' action should he die? We refuse to tell the injured mariner to "take the cash and let the promise go,"[4] for *Moragne's* broad purposes will permit

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[4]Edward Fitzgerald, *Rubaiyat of Omar Khayam of Naishapur*, Stanza XIII.

no such ukase. Therein the Supreme Court, at 387, reiterated with approval Chief Justice Chase's remarks in The Sea Gull:

> ... and certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.
> 21 Fed.Cas. 909, 910 (No. 12,578) (C.C.Md. 1865).

Nor does anything in the Supreme Court's decisions in *Mellon v. Goodyear*, 277 U.S. 335, 48 S.Ct. (1928) and *Flynn v. New York, N.H.&H.R. Co.*, 283 U.S. 53, 51 S.Ct. 357 (1931) persuade us otherwise. In those two cases, both of which were actions on behalf of a decedent's widow to recover damages for wrongful death under the Federal Employer's Liability Act, 45 U.S.C.A. §§ 51-59, the Supreme Court denied relief on the grounds that:

> By the overwhelming weight of judicial authority where a statute of the nature of Lord Campbell's Act in effect gives a right to recover damages for the benefit of dependents, the remedy depends upon the existence in the decedent at the time of his death of a right of action to recover for such injury. Mellon v. Goodyear, *supra*, at 344.

In the *Mellon* case, the decedent had effected a compromise with his employer before death, and in the

Flynn case, the statute of limitations had run on the decedent's personal injury right before death.[8] Though we find those two cases analogous to the one before us, we do not construe them as amounting to "established and inflexible rules" that *must* now be applied in the admiralty court to bar Mrs. Gaudet's remedy. First, as previously stated, Mr. Gaudet did have a cause of action immediately before death. Though we could rest our decision on that basis alone, we choose not to do so. The policy favoring recovery for a breach of a federal maritime duty is far too important to be left teetering on such a technicality. *Moragne* at 393. We are persuaded that, at least in the admiralty law, the Supreme Court has made the cleavage between a personal injury and a wrongful death suit unmistakable in *Moragne* — the wrongful death right is completely independent from and in nowise derivative of the decedent's personal injury claim. That was not so in *Mellon* and *Flynn;* in those cases wrongful death rose and fell with personal injury. Thus if we assume that a "statute of the nature of Lord Campbell's Act" ought to be interpreted for FELA purposes today as foreclosing any remedy to a spouse whose partner recovered during his or her life, *Mellon* at 344, we must conclude it could not have been such a Lord Campbell's Act that the Supreme Court gave to admiralty in *Moragne*. It was rather an action that would reaffirm the "special solicitude" the admiralty court held for those coming within its

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[8] In a comparable FELA case, the Ninth Circuit has recently strictly adhered to the principle announced in *Mellon*. Walrod v. Southern Pacific Co., 447 F.2d 930 (9th Cir. 1971).

jurisdiction;[6] an action that would extend a remedy save where there was a legislative direction to except a particular class of cases;[7] and an action that would in some measure compensate for the total loss of one upon whom others depended.[8] We hold that such an action is not one that can be sued out, sold out, compromised, or lost by the deceased's actions or inaction before it ever comes into being.

REVERSED and REMANDED.

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[6] *Moragne* at 387.
[7] *Id.* at 393.
[8] *Id.* at 382.

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72-1019

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. A-534

HELEN STEIN GAUDET, Administratrix of
THE ESTATE OF AWTREY C. GAUDET, SR.,
Plaintiff-Appellant,

versus

SEA-LAND SERVICES, INC.,
Defendant-Appellee.

RESPONSE OF PLAINTIFF-APPELLANT IN OPPOSITION TO GRANT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Helen Stein Gaudet, Administratrix (respondent here and plaintiff-appellant below), in compliance with the orders of the Court makes the following response to the petition for certiorari in the above cause:

OPINIONS BELOW

The minute entry of the District Court in dismissing plaintiff's petition is correctly quoted in Appendix A of the petition for certiorari and the opinion of the Fifth Circuit is correctly produced in Appendix B, reported in 463 F.2d 1331.

JURISDICTION

The jurisdiction of this Court is conceded under Title 28 Section 1254(1) United States Code.

QUESTIONS PRESENTED

Respondent concedes arguendo the correctness of the questions presented in (1) through (5) of the petition for certiorari but avers that the sixth "Question" assumes falsely that *"the award to decedent included pecuniary loss and anticipated all losses resulting from the accident"* since the award to decedent before his death quite obviously could not include damages from his death.

STATEMENT OF THE CASE

The facts are correctly stated in the opinion of the Fifth Circuit.

ARGUMENT

I

In Paragraph I of "Reasons for Granting the Writ of Certiorari," (p. 7 of application) petitioner asserts that the 5th Circuit has created a conflict between the General Maritime Law on one hand and the Jones and Death on the High Seas Act on the other.

Respondent submits that the 5th Circuit did not try to expand the scope of *Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970),* nor does the opinion attempt to spell out which items of damages are compensable. That was left for another interpretation of *Moragne.* Therefore, if any conflict exists, as asserted here, it was not created in this case. The conflict would be between *Moragne* and the *Jones* and *High Seas Act,* not *Gaudet* and those statutes.

II

In Paragraph II of "Reasons for Granting the Writ of Certiorari" petitioner (p. 8 of application) asserts that a conflict has been created between the Fifth and Third Circuits because the instant decision is in conflict with *Roberts v. Union Carbide Corp., 415 F.2d 474 (3rd Cir. 1969).*

Respondent submits that *Roberts* is an opinion solely concerned with the interpretation of a New Jersey statute. In that opinion, the Third Circuit relied on two New Jersey cases cited. See 415 F.2d 474 at 475.

The instant case is an interpretation (of *Moragne v. States Marine Lines, Inc.*, 398 *U.S.* 375 *(1970)* and could hardly create a conflict with an interpretation of a New Jersey "survival" statute.

III

In Paragraphs III and IV of "Reasons for Granting the Writ of Certiorari," petitioner merely disagrees with the rationale of the decision of the Circuit Court. Respondent submits that this does not constitute grounds for granting of writs to this Court.

The death claim in the instant case is born in the admiralty law, *Moragne v. States Marine Lines, Inc.*, 398 *U.S. 375, 90 S.Ct. 1772 (1970). Moragne* recognizes the right of those closest to the decedent to recover for "their total loss of one on whom they depended."

Petitioner is correct in stating that the majority view precludes the recovery by a beneficiary after the recovery by a decedent during his lifetime. However, the "majority" view is based on interpretations of so-called "survival" statutes and not true "death" statutes. A short, but accurate, exposition of the distinction is found in *Wilson v. Massengill, 124 F.2d 666, cert. den. 62 S.Ct. 1274 (1942),* in which the Sixth Circuit distinguishes the Tennessee "survival" statute from the South Carolina "death" statute, holding that the latter was not "res judicata" after decision in the former.

Returning to the *Moragne* decision, it is clear that this Court recognized only the right conferred in the South Carolina statute. Throughout the opinion the Court refers to "their total loss of one on whom they de-

pended." *90 S.Ct. 1772 at 1778.* Specifically, the Court discussed the common law rule that a personal cause of action "did not survive the death of its possessor." The Court continued "However, it is now universally recognized that because this principle pertains only to the victim's own personal claims, such as for pain and suffering, it has no bearing on the question whether a dependent should be permitted to recover for the injury he suffers from the victim's death." *90 S.Ct. 1772 at 1780.*

We believe that the well-reasoned decision of the Fifth Circuit discusses these problems at length and we rely on that decision as part of this response.

Wherefore respondent prays that the application for certiorari be denied.

Respectfully submitted,

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CERTIFICATE

I, George M. Leppert, hereby certify that I am a member in good standing of the Bar of the Supreme Court of the United States, that all of the foregoing facts are true and correct and that a copy of the foregoing response has been served upon opposing counsel, correctly addressed and postage prepaid on the ____ day of April, 1973.

_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

72-1019

NO. A-534

HELEN STEIN GAUDET, ADMINISTRATRIX
OF THE ESTATE OF AWTREY C. GAUDET, SR.,

Appellees

VS.

SEA-LAND SERVICES, INC.,

Appellant

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE APPELLANT

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BRIEF FOR THE APPELLANT

OPINIONS BELOW

The United States District Court for the Eastern District of Louisiana, Heebe, J., on October 28, 1971 dismissed the plaintiff's claim on the grounds of res judicata and for failure to state a claim upon which relief can be granted. No opinion was rendered from

the United States District Court.

The United States Court of Appeals for the Fifth Circuit, Clark, J., on August 3, 1972, reversed and remanded the judgment of the United States District Court for the Eastern District of Louisiana. The opinion is reported at 463 F. 2d 1331. Sea-Land's petition for rehearing to the United States Court of Appeals for the Fifth Circuit was denied on August 24, 1972 and reported at _____ F. 2d _____.

On May 7, 1973 the United States Supreme Court granted Sea-Land's petition for writ of certiorari.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28, Section 1254 (1) United States Code.

QUESTIONS PRESENTED

(1) Does recovery during the lifetime of a decedent under General Maritime Law for injuries preclude the survivors of decedent from instituting further claims for pecuniary loss resulting from the death of decedent?

(2) Do the survivors have a separate cause of action for pecuniary loss for death under General Maritime Law when the deceased, before his death has reduced his claim for pecuniary loss to judgment?

(3) Has the traditional refusal to award damages for loss of love and affection, society, companionship and loss of consortium under General Maritime Law, the Jones Act and the Death on the High Seas Act been changed

by the Supreme Court in their decision in MORAGNE VS STATES MARINE LINES, 398 U. S. 375, 90 S. Ct. 1772 (1970)?

(4) Is the uniformity intended by MORAGNE VS STATES MARINE LINES in fact destroyed by allowing damages for non pecuniary losses whereas the Jones Act and the Death on the High Seas Act have not traditionally allowed such recovery?

(5) Is not the defendant deprived of his property without due process of law when the survivors of an injured party are allowed to present a new claim for pecuniary loss despite the fact that during his lifetime the decedent reduced his claim for pecuniary loss to a final judgment from a court of competent jurisdiction?

(6) Since the award to decedent before his death included pecuniary loss and anticipated all losses resulting from the accident, are not his survivors then restricted to recovery for non pecuniary damages (i.e., loss of love and affection, society, companionship and loss of consortium) which damages have never been allowed under the Jones Act, Death on the High Seas Act or General Maritime Law?

STATEMENT OF THE CASE

The facts necessary to place in their setting the questions now raised can be briefly stated:

On October 29, 1966 Awtrey C. Gaudet, Sr. was injured on board the S/S CLAIBORNE, a vessel in navigable waters within the territorial limits of the State of Louisiana. After injury, suit was instituted by Awtrey C. Gaudet, Sr. in the United States District

Court, Eastern District of Louisiana. (A. 1). This first case culminated in a jury verdict for Mr. Gaudet, Sr. with an award of $175,000.00 to be reduced by 20% for contributory negligence. (A. 2).

Ten days after the jury award, Mr. Gaudet, Sr. died and thereafter his widow, Helen Stein Gaudet, was substituted in this first case to defend post-trial motion and to answer the appeal.

In the appeal of the original suit Mrs. Gaudet did not amend her answer to the defendant's appeal or request additional payment for financial loss due to her husband's death, and in effect acknowledged that she had recovered for the financial loss incurred. On June 24, 1970 Mrs. Gaudet was paid the sum of $131,000.00 which represents payment for severe financial loss by any reasonable standard.

Subsequently, this second suit was filed in the United States District Court, Eastern District of Louisiana by the widow of the deceased, alleging financial loss resulting from her husband's death, which she alleged was a result of the original accident of October 1966. (A. 3).

The defendant, Sea-Land Services, Inc., moved to dismiss the widow's claim for financial loss on the grounds of res judicata and for failure to state a claim upon which relief can be granted.

On October 29, 1971 after oral argument and consideration of supporting memorandums, the United States District Court granted the defendant's motion to dismiss. (A. 4).

The United States Court of Appeals for the Fifth Circuit, on August 3, 1972, reversed and remanded the case to the District Court and indicated that the deceased's recovery for his personal injuries and financial loss prior to his death did not bar Mrs. Gaudet's wrongful death action to recover for her financial loss. (A. 5).

The Court of Appeals acknowledged, in footnote 1 of their opinion, the possibility of double recovery but did not go forward to distinguish pecuniary from non-pecuniary losses and the recoverability by Mrs. Gaudet of non-pecuniary losses.

On August 24, 1972 the United States Court of Appeals for the Fifth Circuit denied the defendant's Petition for Rehearing. (A. 6). No opinion was rendered in connection with the denial of a rehearing.

On May 7, 1973 the Supreme Court of the United States granted Sea-Land's petition for writ of certiorari.

ARGUMENT

I

The United States Court of Appeals for the Fifth Circuit has created a conflict between recovery under General Maritime Law, the Jones Act and Death on the High Seas Act by allowing recovery for loss of love and affection, society, companionship and loss of consortium under the General Maritime Law in death cases whereas it has never been allowed under cases arising under the Jones Act or the Death on the High Seas Act.

Only one cause of action arose at the

time of Awtrey Gaudet's accident on October 29, 1966. Two rights of action arose at that time; first, the right of Gaudet to prosecute his claim for personal injuries and resulting financial loss and, second, the right of Gaudet's survivors to prosecute the claim in the event Gaudet failed to prosecute it during his lifetime. The law allows only one right of action to be exercised, and because it was exercised by Gaudet during his lifetime, then no right of action was inherited by his survivors. Mr. Gaudet pursued his right of action to judgment during his lifetime. His widow defended the appeal successfully and the judgment was paid to her.

This second suit by Mrs. Gaudet alleges severe financial loss. It is submitted that the only elements of damages that Mrs. Gaudet has not been specifically compensated for is loss of love and affection, society, companionship and loss of consortium. Mr. Gaudet and his heirs have already recovered for all pecuniary losses as well as those non-pecuniary losses of Mr. Gaudet such as pain and suffering in the first suit.

Now, Mrs. Gaudet is attempting to recover for her non-pecuniary loss, that being loss of love and affection, society, companionship and loss of consortium. The District Court said No to this claim. The Court of Appeals for the Fifth Circuit, by reversing the lower court, said Yes to Mrs. Gaudet's claim. This decision by the Fifth Circuit has created a serious conflict between the General Maritime Law as formulated by the Fifth Circuit under the instructions and suggestions of the Supreme Court in Moragne on the one hand and the Jones Act and the Death on the High Seas Act on the other.

Under the Jones Act and the Death on the High Seas Act recovery is not allowed for survivor's grief and similar non-pecuniary losses. Igneri v. Cie de Transports Oceaniques, 323 F. 2d 257 (2nd Cir. 1963); Middleton v. Luckenbach S.S. Co., 70 F. 2d 326 (2nd Cir. 1934). Moreover, under the General Maritime Law most courts have uniformly held that damages for loss of love and affection, society, companionship and loss of consortium are not recoverable.

See Simpson v. Knutsen, 444 F. 2d 523 (9th Cir. 1971); Green v. Ross, 338 F. Supp. 356 (S.D. Fla. 1972); Dennis v. Central Gulf Steamship Corp., 453 F. 2d 137, 140 (5th Cir. 1972); Smith v. Olsen and Ugelstad, 324 F. Supp. 578 (E. D. Mich. 1971); Mugin v. Calmar Steamship Corporation, 342 F. Supp. 479 (D. Md. 1972); and Mascuilli v. United States, 343 F. Supp. 439 (E. D. Pa. 1972).

The recent Louisiana case of Strickland vs. Nutt, 264 So. 2d 317 (1st Cir. 1972) is consistent with this view in denying recovery for non financial loss under General Maritime Law.

The Fifth Circuit, in reversing the ruling of the District Court, has in effect changed the law and now will allow recovery for non-pecuniary losses to the survivors under the General Maritime Law, whereas this recovery is not allowed under the Jones Act or Death on the High Seas Act. It is submitted that the Fifth Circuit decision should be reversed by the Supreme Court in favor of Sea-Land so that damages for loss of love and affection, society, companionship and loss of consortium are not recoverable under the General Maritime Law.

II

The Fifth Circuit has created a conflict with the Third Circuit case of Roberts vs. Union Carbide, 415 F. 2d 474 (1969).

In the case of Roberts vs. Union Carbide, 415 F. 2d 474 (3rd Cir. 1969), plaintiff obtained judgment for Two Hundred and Ten Thousand ($210,000.00) Dollars for personal injuries. Five years after the accident decedent died and his survivors brought suit against the same defendant alleging that the prior accident was the cause of death. In affirming the trial court's dismissal of the matter, the Third Circuit stated:

> "The plaintiff's cause of action is barred and extinguished by the decedent's having obtained recovery during his lifetime."

The Third Circuit observed that this view is consistent with that of nearly all states having similar statutes and also referred to the annotation in 39 ALR 579 (1925).

The Fifth Circuit in their opinion (Appendix 5) in the face of Mellon vs. Goodyear, 277 U. S. 335, 48 S. Ct. 541 (1928), Flynn vs. New York, N. H. & H. R. Co., 283 U. S. 53, 51 S. Ct. 357 (1931) and Walrod vs. Southern Pacific, 447 F. 2d 930 (9th Cir. 1971) ruled to the contrary. The Supreme Court in Moragne suggested that cases in other areas of law should be employed to resolve questions raised but not answered by Moragne (398 U. S. at 391 and 392). However, the Fifth Circuit has refused to follow clearly established rules in similar fields of law. The aforementioned cases held that a decedent's recovery of damages for injuries which subsequently result in

his death is a bar to an action by his personal representative for wrongful death. The Fifth Circuit in the Gaudet case has reached a different conclusion and has found that the recovery during decedent's lifetime is not a bar to his survivor's suit for additional damages. This conflict should be resolved by the United States Supreme Court by reversing the decision of the Fifth Circuit Court of Appeals so that harmony and uniformity will prevail among the Circuits and so that the rights of litigants will be more clearly defined.

III

The United States Court of Appeals for the Fifth Circuit has misunderstood the intent of the United States Supreme Court in the case of Moragne vs. States Marine Lines, 398 U. S. 375 (1970) and has in effect undermined the finality of recoveries by settlement or judgment for personal injuries and opened the door for survivors to come back into court years later after the death of the decedent requesting additional damages for financial loss.

Before the Moragne decision there was no Florida remedy for Moragne's widow and the Supreme Court, seeing the injustice and failure of the General Maritime Law to provide a remedy, reversed the harsh rule of The Harrisburg, 119 U. S. 199, and gave the widow a cause and right of action to recover for the financial loss resulting from her husband's death. In the Gaudet case, however, Mr. Gaudet had filed suit and taken his case to judgment before his death. The Fifth Circuit is treating the Gaudet case as if no judgment had in fact been obtained and as if Gaudet had not in fact taken any steps to preserve his rights during his lifetime. In the closing sentence of the opinion the Fifth Circuit states:

> "We hold that such an action (for wrongful death) is not one that can be sued out, sold out, compromised or lost by the deceased's actions or inaction before it ever comes into being."

The Court also states that Mr. Gaudet had a cause of action immediately before his death. The Fifth Circuit, it is submitted, is mistaken in this statement for the cause of action for his injuries had been reduced to a judgment which judgment had become a property right and which was inherited by the survivors following his death.

We submit that the case of Mellon vs. Goodyear, 277 U. S. 335 (1928) enunciates principles of law which are applicable here. In the Gaudet decision the Fifth Circuit quoted from the Mellon case at page 344:

> "By the overwhelming weight of judicial authority where a statute of the nature of Lloyd Campbell's Act in effect gives a right to recover damages for the benefit of dependents, the remedy depends upon the existence in the decedent at the time of his death of a right of action to recover for such injury." (Emphasis added).

However, the Fifth Circuit failed to quote the next sentence from the decision, which continues the thought and makes a closer application to Gaudet:

> "A settlement by the wrongdoer with the injured person, in the absence of fraud or mistake, precludes any remedy by the personal representative based upon the same wrongful

act." (Emphasis added). Mellon vs. Goodyear, 277 U. S. at 344.

Therefore, there was no longer any remedy t the time of decedent's death or thereafter or this right had been extinguished.

See also the case of Flynn vs. New York, . H. & H. R. Co., 283 U. S. 53 (1931) where ecedent was injured in 1923, died in 1928, nd his executor brought a wrongful death ac- ion in 1929. Mr. Justice Holmes, speaking or the Court said:

"Obviously Flynn's right of action was barred, but it is argued that the right on behalf of the widow and children is distinct; that their cause of action could not arise until Flynn's death, and that therefore the two years did not begin to run until September 1, 1928. But the argument comes too late. It is established that the present right, although not strictly representative, is derivative and dependent upon the continuance of a right in the injured employee at the time of his death. On this ground an effective release by the employee makes it impossible for his administrator to recover. The running of the two years from the time when his cause of action accrued extinguishes it as effectively as a release, Engel v. Davenport, 271 U. S. 33, 38, 46 S. Ct. 410, 70 L. Ed. 813, and the same consequence follows * * *" (Emphasis added) 283 U. S. at 56, 51 S. Ct. at 358.

The Honorable Judge Alvin B. Rubin's

comments at the motion for new trial following the death of the decedent are most appropriate here, as they reflect the well established rule that after a final judgment, neither the plaintiff can come back for more nor can the defendant request a reduction due to facts occurring subsequent to the judgment.

> "Now I know and am about to say with respect to damages that we judge all things as of the date of the trial, we can't reopen damages we all know, the Jurisprudence is voluminous for post trial events. The plaintiff gets Ten Thousand Dollars because everybody thinks his injury is minor and then he goes to have it operated on and it proves fatal, he dies. We can't come back and have a new day in Court.
>
> "When you die, the widow comes to Court and goes out the day after she gets the award and marries a rich man who had been courting her all along; these are historic problems and the jury says, and I don't think we can reopen with respect to damages for what happens afterward either way." (Transcript p. 408).

See also the case of Schlavick vs. Manhatten Brewing Company, 103 F. Supp. 744 (ND Ill.) (1952). The Court stated in Schlavick as follows:

> "A decedent's recovery of damages for injuries, which resulted in his death, is a bar to an action by his personal representative for wrongful death."

"An action by a personal representative for the wrongful death of his decedent will be barred if such decedent in his lifetime made a valid settlement for the injuries which resulted in his death."

IV

The protective application of the doctrine of Res Judicata has been undermined by the United States Court of Appeals for the Fifth Circuit.

The Court should take note of the fact that the language in the suit brought by the widow was identical to the language in the suit brought by plaintiff before his death. Both pleadings claim that "severe financial loss" was caused by the accident and the death of decedent.

In the action filed by the widow, no request is made for damages for non-pecuniary loss such as loss of love and affection, companionship and loss of consortium. The only allegation of damage is that the widow suffered "severe financial loss".

Claimant died ten days following the jury award of $175,000.00. Plaintiff did not file for a new trial requesting that the question of damages be reopened so that damages arising out of the death of decedent could be included in the judgment. Counsel for decedent's survivors was well aware of the prohibition against such a request. On appeal of the first case, counsel for claimant did not request enlargement of the judgment due to the death of the decedent nor were any allegations made at any time that the award was inadequate or should be amended. Rather on June 24, 1970,

she accepted the sum of $131,000.00 in full satisfaction of the judgment and then instituted the claim for wrongful death upon which this appeal is based.

Two conditions must be met in order for the exception of Res Judicata to apply:

> 1. "The judgment or decree of a Court of competent jurisdiction on the merits precludes the parties and their privies to the litigation and constitutes a bar to a new action or suit involving the same cause of action either before the same or any other tribunal, and
>
> 2. Any right, fact or matter in issue, and directly adjudicated on or necessarily involved in the determination of an action before a competent Court in which a judgment or decree is rendered on the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and their privies whether or not the claim or demand, purpose or subject matter of the two suits is the same." Vol. 50 Corpus Juris Secundum, Sec. 592, p. 11. (Emphasis supplied.)

We submit that the second suit by the widow meets all of the essential elements necessary to invoke the doctrine of Res Judicata.

The widow of the deceased cannot recover again for loss of future earnings which the deceased would have earned had he lived, as his recovery in the first case included the loss of earnings, past and future. Allowance

of such recovery would compensate the widow twice for the identical elements of damage. The allegations of the pleadings are identical and again the widow is requesting payment for "severe financial loss". The widow is seeking the proverbial pound of flesh, which the Court has no power to grant. It is submitted that the Fifth Circuit's decision, if allowed to stand, will deprive the appellants of their property without due process of law in violation of the Fourteenth Amendment to the Constitution. The law fashioned by the Fifth Circuit in their decision, it is respectfully suggested, is not the law of the land, is not the General Maritime Law, is not consistent with the Jones Act or the Death on the High Seas Act and should be so held by the Supreme Court by reversing the Court of Appeals, and by reinstating the District Court's ruling rejecting the claim of Helen Stein Gaudet.

We do not dispute the right of Helen Stein Gaudet to file suit for damages resulting from the accident to Mr. Gaudet, had her husband never filed suit in his own behalf. However, those "potential rights of his survivors were extinguished when he brought the first suit and subsequently obtained a jury award. The judgment obtained by Mr. Gaudet before his death was inherited as a property right by his widow. She has no right to enlarge it.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that the decision of the Fifth Circuit Court of Appeals be reversed and that the ruling of the United States District Court for the Eastern District of Louisiana

be reinstated rejecting the claim of Helen Stein Gaudet.

Respectfully submitted,

McCLENDON, GREENLAND & DENKMAN

By: _____

RICHARD L. GREENLAND
3301 North Causeway Blvd.
Metairie, Louisiana 70002
Telephone: 837-2144
Attorneys for defendant,
Sea-Land Services, Inc.

PROOF OF SERVICE

I, Richard L. Greenland, attorney for defendant and a member of the bar of the Supreme Court of the United States, hereby certify that on this day, I have served copies of the foregoing brief on the merits and appendix on:

GEORGE W. REESE, Attorney
627 National Bank of Commerce
New Orleans, Louisiana 70112

by mailing a copy thereof, postage prepaid addressed to their respective offices, this 29th day of June, 1973.

_____
RICHARD L. GREENLAND

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. A-534

HELEN STEIN GAUDET, ADMINISTRATRIX
OF THE ESTATE OF AWTREY C. GAUDET, SR.,

Appellees

V.

SEA-LAND SERVICES, INC.

Appellant

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 22, 1973
CERTIORARI GRANTED MAY 7, 1973

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APPENDIX NO. 1

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

AWTREY C. GAUDET	CIVIL ACTION
AGAINST	IN ADMIRALTY
SEA-LAND SERVICES, INC.	NO. 67-1276
	SECTION G

COMPLAINT

I

That at all times hereinafter mentioned, the plaintiff was and still is, a citizen of the State of Louisiana, and residing at 4722 Good Drive, New Orleans, Louisiana; defendant is a corporation organized under the laws of and domiciled in the State of New Jersey.

II

At all times mentioned herein, the defendant was, and still is, the owner and operator of the S/S CLAIBORNE, which at the time of the occurrence herein was a merchant ship, said vessel can now be found or during the pendency of this action will be within the Port of New Orleans and within the territorial jurisdiction of the United States.

III

That the plaintiff was employed as a longshoreman aboard said vessel, which was docked in the Mississippi River on October 29, 1966 on the navigable waters of the

United States in the City of New Orleans, State of Louisiana.

IV

That at the time and place mentioned above, plaintiff was going about his duties as a longshoreman when he slipped, coming from a tier of cargo, injuring his back.

V

That the accident and resulting injury was caused by the unseaworthiness of the S/S CLAIBORNE in that it was not provided with ladders to go from tier to deck and the deck was greasy.

That prior to these injuries, plaintiff was a strong, able-bodied man gainfully employed and capable of earning in excess of One Hundred ($100.00) Dollars per week. As a result of these injuries, plaintiff has been unable to pursue his occupation with the same degree of proficiency and he has sustained permanent disability, has suffered physical agony and will continue to do so and has suffered loss of wages and will continue to do so.

WHEREFORE, plaintiff demands judgment against Sea-Land Services, Inc. in the full sum of Two Hundred and Fifty Thousand ($250,000.00) Dollars.

Please Serve
Defendant:
Sea-Land Services,
Inc., through
Secretary of State

REESE & ABADIE
PETER J. ABADIE, JR.
ATTORNEYS FOR PLAINTIFF
627 N.B.C. BLDG. 523-1953
NEW ORLEANS 70112

APPENDIX NO. 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

AWTREY C. GAUDET
versus
SEA-LAND SERVICES, INC.

CIVIL ACTION
NO. 67-1276
SECTION "C"

Filed: June 25, 4:11 p.m.,1970

J U D G M E N T

Considering the answers returned by the jury herein, to the interrogatories propounded to it by the Court on June 23,1970, and considering the direction of the Court as to the entry of judgment;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein, in favor of plaintiff, Awtrey C. Gaudet, and against defendant, Sea-Land Services, Inc., in the sum of $140,000.00 and costs.

Dated at New Orleans, Louisiana, this 25th day of June, 1970.

Benjamin W. Reisch
BENJAMIN W. REISCH, Clerk

By /s/ Nelson B. Jones
Nelson B. Jones, Chief
Deputy Clerk

Approved as
to form:

/s/ Alvin B. Rubin
UNITED STATES DISTRICT JUDGE

George W. Reese, Esq.
Andrew T. Martinez, Esq.
Stuart A. McClendon, Esq.

APPENDIX NO. 3

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

HELEN STEIN GAUDET, ADMINISTRATRIX OF THE ESTATE OF AWTREY C. GAUDET, SR. — CIVIL ACTION 70-3035

AGAINST — SECTION B

SEA-LAND SERVICES, INC.

COMPLAINT

Plaintiff is domiciled in the State of Louisiana and is the administratrix of the estate of Awtrey C. Gaudet, Sr., and resides at 4722 Good Drive, New Orleans, Louisiana; defendant is a corporation organized under the laws of and domiciled in the State of New Jersey. The matter in controversy exceeds $1,000.00 exclusive of interest and costs.

II.

At all times mentioned herein, the defendant was, and still is, the owner and operator of the S/S Claiborne, which at the time of the occurrence herein was a merchant ship, said vessel can now be found or during the pendency of this action will be within the Port of New Orleans and within the territorial jurisdiction of the United States

III.

That Awtrey C. Gaudet, Sr. was employed as a longshoreman aboard said vessel, which

was docked in the Mississippi River on October 29, 1966 on the navigable waters of the United States in the City of New Orleans, State of Louisiana.

IV.

That at the time and place mentioned above, Awtrey C. Gaudet, Sr. was going about his duties as a longshoreman when he slipped, coming from a tier of cargo, injuring his back.

V.

That the accident and resulting injury was caused by the unseaworthiness of the S/S Claiborne in that it was not provided with ladders to go from tier to deck and the deck was greasy.

VI.

That plaintiff was dependant for support on the said Awtrey C. Gaudet, Sr. and that as a result of the injuries and treatment resulting therefrom described in Paragraph IV, the said Awtrey C. Gaudet died on June 29, 1970.

VII.

That as a result of the death of Awtrey C. Gaudet, Sr. plaintiff suffered severe financial loss.

VIII.

That the unseaworthiness of the said S/S CLAIBORNE as described in Paragraph V of this Complaint has already been decided

by a judgment of this Court and is now res judicata.

WHEREFORE, plaintiff demands judgment against Sea-Land Services, Inc. in the full sum of TWO HUNDRED and FIFTH THOUSAND ($250,000.00) DOLLARS.

REESE & ABADIE
GEORGE W. REESE
Attorney for Plaintiff
627 NBC Building
523-1953
New Orleans 70112

PLEASE SERVE DEFENDANT:

Sea-Land Services, Inc.
Through Secretary of State

APPENDIX NO. 4

The Minute Entry of the United States District Court, Eastern District of Louisiana, dismissing the Complaint of Helen Stein Gaudet in Case No. 70-3035 has been included in Appellant's Petition for Writ of Certiorari as Appendix "A".

APPENDIX NO. 5

The Opinion of the United States Court of Appeals for the Fifth Circuit has been included in Appellant's Petition for Writ of Certiorari as Appendix "B".

APPENDIX NO. 6

The Order Denying Rehearing by the United States Court of Appeals for the Fifth Circuit has been included in Appellant's Petition for Writ of Certiorari as Appendix "C".

72-1019

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. A-534

HELEN STEIN GAUDET, Administratrix of the ESTATE OF AWTREY C. GAUDET, SR.,
Respondent,

versus

SEA-LAND SERVICES, INC.,
Petitioner.

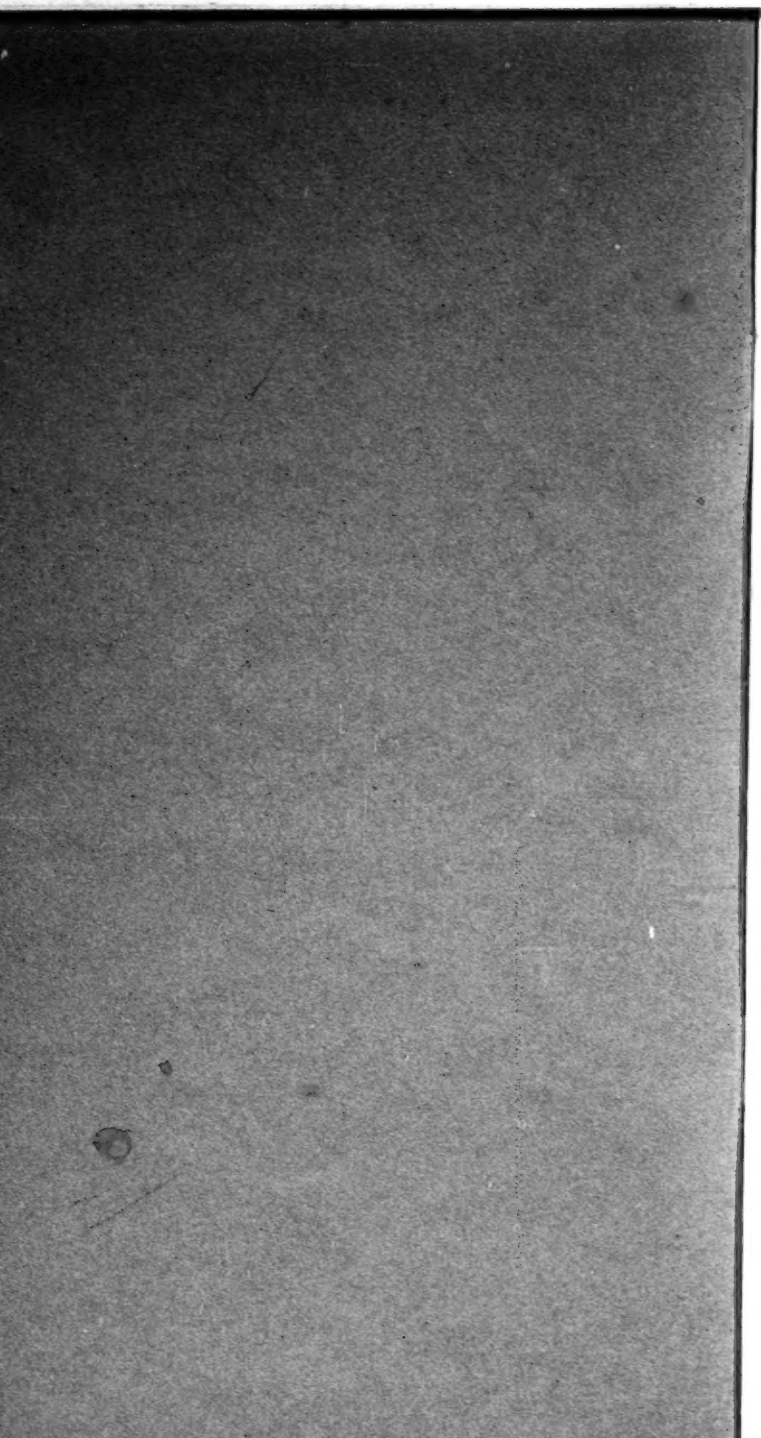
On Application for Certiorari to the Fifth Circuit Court of Appeals

BRIEF ON BEHALF OF RESPONDENT

GEORGE W. REESE
627 First National Bank of Commerce Building
New Orleans, Louisiana 70112
523-1953

George M. Leppert
408 Security Homestead Bldg.
New Orleans, Louisiana 70112

Attorneys for Respondent



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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972

No. A-534

HELEN STEIN GAUDET, Administratrix of the ESTATE OF AWTREY C. GAUDET, SR.,
Respondent,

versus

SEA-LAND SERVICES, INC.,
Petitioner.

On Application for Certiorari to the Fifth Circuit Court of Appeals

---

BRIEF ON BEHALF OF RESPONDENT

QUESTIONS PRESENTED

Respondent accepts, by reference, the "Questions resented" as stated by petitioner, except as hereinfter clarified.

Thus, we clarify and restate the sixth question, to ead as follows:

. (a) In the light of Moragne vs. States Marine nes, 398 U.S. 375, 90 S.Ct. 1772, does an award to decedent made pursuant to a judgment in his favor

prior to his death "anticipate all losses resulting from the accident"? and

(b) Do the survivors still have a claim for their own losses?

STATEMENT OF THE CASE

Except as hereinafter noted, respondent accepts by reference the "STATEMENT OF THE CASE" of petitioner.

The clarification first to be noted relates to the third paragraph on page 4 of the petition for certiorari, wherein it is stated:

> "Ten days after the jury award, Mr. Gaudet, Sr. died and thereafter his widow, Helen Stein Gaudet, was substituted in this first case to defend post-trial motion and to answer the appeal.
>
> In the appeal of the original suit Mrs. Gaudet *did not amend her answer to the defendant's appeal or request additional payment for and in effect acknowledged that she had recovered for the financial loss incurred.* On June 24, 1970 Mrs. Gaudet was paid the sum of $131,000.00 which represents payment for severe financial loss by any reasonable standard." (Emphasis added)

Obviously, in answering the appeal after the death of her husband, the widow was not called upon to present issues other than those already presented in the record as it stood at the time of her husband's death. As of that moment she had a perfect right to defend the judgment as it stood without being subjected to the obvious delay of having a judicial determination of the amount of *her* loss.

Next, on page 6 of the petition, second paragraph, it is stated:

> "The United States Court of Appeals for the Fifth Circuit, on August 3, 1972, reversed and remanded the case to the District Court and indicated that the deceased's recovery for his personal injuries and financial loss prior to his death did not bar Mrs. Gaudet's wrongful death action to recover from her financial loss.
>
> The *Court of Appeals acknowledged, in footnote 1 of their opinion, the possibility of double recovery* but did not go forward to distinguish pecuniary from non-pecuniary losses and the recoverability by Mrs. Gaudet of non-pecuniary losses." (Emphasis Added)

The foregoing is a gross distortion, as will appear in Argument below.

ARGUMENT

Because petitioner's approach might be described as a sophisticated form of semantic ballet dancing, it becomes necessary to "stop the music" and begin at the beginning:

First, let us examine the actual holding of the Fifth Circuit in the instant case. On page 1333 of 463 F.2d, after listing the various elements of damages in death cases, the Court then quoted the Carroll case, and makes the following comment:

> "As the Supreme Court said in the Carrol case, supra, 280 U.S. at 494, 50 S.Ct. at 183:
>
> > Although originating in the same wrongful act of neglect, the two claims [personal injury and wrongful death] are quite distinct, no part of either being embraced in the other.
> >
> > ... St. Louis, Iron M & S.Ry. Co. v. Craft, 237 U.S. 648, 658, 35 S. Ct. 704, 706, 59 L.Ed. 1160 (1915).
>
> *We intimate nothing as to the possibility of Mrs. Gaudet proving any of the possible damage elements listed above, nor which of them should be includible in this federal maritime action.* See 25 Ark. L. Rev. 510 (1972). *We note only that some of these elements have already been specifically recognized as compensable,*

Dennis v. Central Gulf Steamship Corporation, 453 F.2d 137 (5th Cir. 1972); In re Sincere Navigation Corp., 329 F.Supp. 652 (E.D. La.1971), and were not part of Mr. Gaudet's recovery. We conclude, then, that Mrs. Gaudet's suit is not res judicata and such further wrongful deaths compensation as she might receive will not be part of a twice-told tale."

THE COUNTERFEIT CONFLICT

Invoking a classic basis for grant of certiorari, a conflict between two Circuits, petitioner, like a bird dog with a bad head cold, has come to a "false point" by urging that the instant decision by the Fifth is at odds with the 1969 decision of the Third Circuit in ROBERTS V. UNION CARBIDE CORP., 415 F.2d 474.

Respondent submits that ROBERTS is an opinion solely concerned with the interpretation of a New Jersey statute. In that opinion, the Third Circuit relied on two New Jersey cases cited. See 415 F.2d 474 at 475.

The instant case is an interpretation (of MORAGNE V. STATES MARINE LINES, INC., 398 U.S. 375 (1970) and could hardly create a conflict with an interpretation of a New Jersey "survival" statute.

Moreover, a reading of the entire two paragraph Per Curiam in Roberts, supra, will demonstrate why it is not in conflict with the Fifth Circuit holding here. Thus;

"PER CURIAM:

This is an appeal by the plaintiff in a wrongful death action brought under New Jersey Statutes, 2A:31-1, N.J.S.A. It is the responsibility of the federal courts solely because of the diversity of citizenship of the parties. The essential facts are that the plaintiff's decedent inhaled dangerous fumes while in the employ of All American Engineering Company. During his lifetime the decedent obtained a judgment of $210,000 against Union Carbide as damages for this mishap, and this judgment was satisfied after an unsuccessful appeal. *Some five years later the decedent died,* allegedly as a result of the defendant's above mentioned negligence. Plaintiff brought suit and summary judgment was entered for the defendant.

While New Jersey's highest court has not ruled on the question raised here, at least two New Jersey cases support the proposition that plaintiff's cause of action is barred and extinguished by the decedent's having obtained a recovery during his lifetime. Lawlor v. Cloverleaf Memorial Park, Inc., Law Div. 1968, 101 N.J. Super. 134, 243 A.2d; Libera v. Whittaker, Clark and Daniels, Inc., Law Div. 1952, 20 N.J. Super. 292, 89 A.2d 734. Compare Lawlor v. Cloverleaf Memorial Park, Inc., App. Div. 1969, 106 N.J. Super. 372, 256 A.2d. We observe that this view is consistent with that of nearly

all states having similar statutes. See Annotation, 39 A.L.R. 579 (1925). *Moreover, the record does not sustain the contention that the present action involves elements of recoverable damage not covered by the decedent's earlier suit.* (Emphasis added)

Conflicts there are (with previous jurisprudence) but these conflictee cases are rather ancient. Thus, the Mellon case, page 10 of petitioners application for certiorari, is a rather old melon (1928) and the treatment at page 11 of the petition is self defeating, once we concede the distinction between causes of action which have not accrued, viz, death.

The 1931 decision in FLYNN V. NEW YORK N.H.&H.R. CO., 283 U.S. 53, involved an issue of prescription or limitations and the other cases cited (page 12, 13, petition) are even further out of focus.

RES JUDICATA

On page 14 of its petition for certiorari it is stated:

"Two conditions must be met in order for the exception of Res Judicata to apply:

1. "The judgment or decree of a Court of competent jurisdiction on the merits precludes the parties and their privies to the litigation and constitutes a bar to a new action or suit *involv-*

ing the same cause of action either before the same or any other tribunal, and

"2. Any right, fact or matter in issue, and directly adjudicated on or necessarily involved in the determination of an action before a competent Court in which a judgment or decree is rendered on the merits *is conclusively settled by the judgment therein and cannot again be litigated between the parties and their privies whether or not the claim or demand, purpose or subject matter of the two suits is the same.* Vol. 50 Corpus Juris Secondum, Sec. 592, P. 11. (Emphasis supplied).

"We submit that the second suit by the widow meets all of the essential elements necessary to invoke the doctrine of Res Judicata.

"The widow of the deceased cannot recover again for loss of future earnings which the deceased would have earned had he lived, as his recovery in the first case included the loss of earnings, past and future. Allowance of such recovery would compensate the widow twice for the identical elements of damage. The allegations of the pleadings are identical and again the widow is requesting payment for "severe financial loss". *The widow is seeking the proverbial pound of flesh, which the Court has no power to grant.*"

A modern statement of the applicable rule of res judicata under the instant facts (and without the Shylockean flourish) is to be found in 46 American Jurisprudence 2d, Sec. 418, page 586, wherein it is stated:

> "The rule granting conclusiveness to a judgment in regard to issues of fact which could properly have been determined in the action is limited to cases involving the same cause of action. Where a second action is upon a different claim, demand, or cause of action, the established rule is that the judgment in the first action operates as an estoppel only as to the issues, points, or questions *actually litigated and determined, and not as to matters not litigated in the former action, even though such matters might properly have been determined therein.*" (Emphasis added)

Obviously, the judgment of the District Court, could not be deemed conclusive as to the effects of the death of decedent in the fullest sense. First of all, his anticipated loss of earnings could only be estimated properly upon his life expectancy, based upon mortality tables.

In its opinion in the instant case the Fifth Circuit recognizes that there may be an "overlap" quo ad "loss of earnings" and the direct effect, financially, upon the widow. The Court left this problem of adjustment on remand to the trial Court, just as it left to the trial Court of all other elements of damage.

But it strikes us, as a matter of common sense that the translation into dollars and cents of the actual loss to a widow of her husband, is a radically different process than the estimated loss of earnings of a husband before he ever dies or knows he is dying.

This is quite separate and apart, of course, from the elements of emotional damage, such as loss of affection, loss of consortium, etc., *all of which is reserved by the Fifth Circuit* in the instant case.

CONCLUSION

For the foregoing reason we respectfully submit that the writ should be denied and the decision of the Fifth Circuit affirmed.

Respectfully submitted

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ATTORNEYS FOR
RESPONDENT

CERTIFICATE OF SERVICE

I, George M. Leppert, hereby certify that I am a member in good standing of the Bar of the Supreme Court of the United States, that all of the foregoing facts are true and correct and that a copy of the foregoing brief has been served upon opposing counsel, correctly addressed and postage prepaid on the 27th day of July, 1973.

_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 72-1019

HELEN STEIN GAUDET, ADMINISTRATRIX
OF THE ESTATE OF AWTREY C. GAUDET, SR.,

Appellees

VS.

SEA-LAND SERVICES, INC.,

Appellant

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. A-534

HELEN STEIN GAUDET, ADMINISTRATRIX
OF THE ESTATE OF AWTREY C. GAUDET, SR.,

Appellees

VS.

SEA-LAND SERVICES, INC.,

Appellant

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

MAY IT PLEASE THE COURT:

Petitioner, Sea-Land Services, Inc., requests that a rehearing be granted in this matter.

The Court not only changes the law drastically in the area of recovery for wrongful death, but also in the area of finality of judgments. Reconsideration should be given to the Court's decision because it affects not only the consistency and quality of the jurisprudence it has

promulgated, but the general welfare of the public as well.

The Court's decision sweeps away those traditional safeguards to which litigants may look to provide stability and finality in their disputes. The following anomalies are presented to both plaintiff and defendant alike:

1) The defendant is exposed to further litigation even though a plaintiff has executed a final release containing language to the effect that he is releasing his claim for all future damages which his "heirs and assigns may have by reason of his death".

2) A judgment of a court of competent jurisdiction granting to plaintiff, during his lifetime, damages for personal injury is not final and the damage question may be reopened following the death of the plaintiff by his survivors.

3) Should plaintiff sustain a maritime personal injury and fail to either settle or litigate the matter, there is no prohibition under the majority's opinion for his widow or survivors coming into court eight or ten or twenty years later following his death and instituting suit for damages alleging that the death was caused by the injury many years previously.

4) The safeguards provided to litigants in the Mellon (277 U.S. 335) and Flynn, (283 U.S. 53) cases ,

have been eliminated and now litigants have been set drift upon the sea of uncertainty and now the occurrence of death is considered as a separate tort which gives rise to a separate cause of action.

The Court was unaware of the progeny which its decision will foster. Justice Holmes stated in the Flynn case on behalf of a unanimous court that an action for wrongful death is "derivative and dependent upon the continuance of a right in the injured employee at the time of his death." (283 U.S. at p. 56). The Court states now that the wrongful death action is not derivative but exists sua sponte without being supported by or contiguous to the tort which allegedly caused it. The Court's opinion in effect gives the widow and survivors of every person who dies after having been injured upon navigable waters the right to institute suit alleging that said death was caused by the injury upon navigable waters no matter whether settlement or judgment had ever intervened and irrespective of the time lapse involved.

In view of the current desire of the federal judiciary system to expedite the handling of cases and to speed up the disposition of matters on appeal, the Court can now expect a veritable deluge of cases with appeals, rehearings, remands and retrials spawned by this opinion. The judicial system and expeditious handling of suits will certainly suffer.

The desire of the court to guarantee to the litigants finality and some sense of security in the governing of their affairs has been swept away and now rather than being guided into more placid waters, litigants

now have been set adrift upon the sea of uncertainty.

Although a dissent is not evidence of a wrong by the majority, justice requires that the dissent be carefully scrutinized to see if an error has been made by the majority.

Although petitioner included in his original petition for writs questions concerning proper damages to be awarded in a maritime death claim, this factor was not dealt with by the Fifth Circuit in its opinion. The primary issue before the Fifth Circuit was whether or not there was a right of action on behalf of the widow in light of the fact that the decedent had already brough his claim to judgment prior to his death. The Court stated in Moragne that it would rely upon the "sifting process" of the Distri and Circuit Courts to develop a body of law consistent with the principals enunciated in Moragne. This sifting process began immediately and had resulted, we submit, in sound and rational conclusions. In fact there was no conflict in the Circuits with regard to the type of damages to be awarded in post-Moragne cases. Why then did the Court take it upon itself to "intrude" into the sifting process which was not encountering any difficulty, mishap or snag. What the Court has done is to reject its own language in Moragne which called upon the District and Circuit Courts to formulate a body of law consistent with the right of recovery for wrongful death under, General Maritime Law, the state law and federal statutes:

Petitioner's original petition for writs, it was supposed, was granted due to the erroneous decision of the Fifth Circuit in deciding their case contrary to the

established law in the Flynn and Mellon cases. There was no conflict between the Circuits in any of the post-Moragne cases with regard to awardable damages to widows and survivors.

We direct the Court's attention to the closing remarks of the Fifth Circuit Court of Appeals speaking through Judge Godbold in the case of petition of M/V ELAINE JONES, 480 F.2d 11 (1973) in discussing the sifting process contemplated by Moragne:

> "The methodology for the 'further sifting' contemplated by Moragne has thus been firmly established in this Circuit. In shaping the new remedy we look first to existing maritime law, to which Moragne has allowed access in a death action. We next examine the remedial policies indicated by Congress in the Federal Maritimes statutes. Heed to these statues will assist in ensuring that 'uniform vindication of federal policies' mandated by the Moragne Court." Page 31.
>
> We conclude that the current rationales underlying recoverability for survivor's grief damages in state death actions are too divergent and ill defined to override the policies against recoverability manifested in general maritime law and in the federal statutes. This conclusion is not based on a mandate that the Moragne recovery be identical in all respects to general maritime law and to federal maritime statutes. Absolute uniformity is neither required nor desirable. Necessarily variations in proof, procedure,

beneficiaries, and damages will affect the nature of recovery under various remedies and will cause the mariner to join alternative claims whenever possible.[24] Our conclusion results rather from measuring the federal policies manifested in the federal statutes and general maritime law against those policies expressed in the state experience and relevant to maritime problems. This is the methodology we perceive to be compelled by Moragne and followed by this court in at least four post-Moragne cases. See Futch v. Midland Enterprises, Inc., 471 F.2d 1195 (5th Cir. 1973) (No. 72-2900); Gaudet v. Sea-Land Servs., Inc., 463 F.2d 1331 (5th Cir. 1972); Dennis v. Central Gulf S.S. Corp., 453 F. 2d 137 (5th Cir. 1972), cert. denied, 409 U.S. 948, 93 S.Ct. 286, 34 L.Ed. 2d 218; Hornsby v. Fish Meal Co., 431 F.2d 865 (5th Cir. 1970).

While not crucial to our decision, we note that other circuits that have considered the issue have uniformly denied grief damages in a general maritime action. See Greene v. Vantage S.S. Corp., 466 F.2d 159 (4th Cir. 1972); Simpson v. Knutsen, O.A.S., 444 F.2d 523 (9th Cir. 1971); In re United States Steel Corp., 436 F.2d 1256 (6th Cir.1970) cert. denied sub nom. Lamp v. United States Steel Corp., 402 U.S. 987, 91 S.Ct. 1649, 29 L.Ed.2d 153 (1971). District courts have divided on the issue. Compare In re Farrel Lines, Inc., 339 F. Supp. 91 (E.D.La.1971); In re Sincere Navigation Corp., supra, with Mungin v. Calmar S.S. Corp.,

342 F.Supp. 479 (D.Md.1972); Curry v. United States, 338 F.Supp. 1219 (N.D.Cal.1971); Green v. Ross, 338 F.Supp. 365 (S.D.Fla.1972). Opinion p. 33, 34 (Emphasis supplied)

We would also point the Court's attention to the case of Petition of U. S. Steel Corporation, 436 F.2d 1256, (Sixth Cir.1970), a post-Moragne decision which refused to grant damages for non pecuniary loss:

> Recognition of a right of recovery for wrongful death under the general maritime law strongly dictates that in order to promote the uniformity and supremacy of the maritime law (See Kossick v. United Fruit Co., 365 U.S. 731, 81 S.Ct. 886, 6 L.Ed. 2d 56 (1961); Southern Pacific Co. v. Jensen, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917), the measure of recovery must be governed by the principles of that law where, as here, there is a conflict between the damages recoverable under the general maritime law (Igneri v. Cie de Transports Oceaniques, supra; Simpson v. Knut Knutsen, O.A.S., supra Valitutto v. D/S I/D Garonne, supra) and those recoverable under state law (Montgomery v. Stephan, supra). Accordingly, upon the remand hereinafter ordered, the District Court is instructed not to allow damages to any claimants with respect to either loss of consortium to the widows or loss of love, companionship and guidance to the adult emancipated children.

The Court in the majority opinion on page 12, footnote 14, cited petition of Canal Barge Company, 323 F. Supp. 805 (1971) for the proposition that non pecuniary damages had been allowed in post-Moragne maritime wrongful death action. The Court was incorrect in citing that case for that proposition as the case did not so hold. The District Judge refused to allow damages for non pecuniary loss but stated that if the Circuit Court should order him to do so that he would grant stated amounts to the widow and children. The Circuit Court upheld the District Court in refusing to make an award for loss of love and affection, and stated:

> Relying by analogy on the Jones Act, 46 U.S.C. § 688, and the Death on the High Seas Act, 46 U.S.C. §§ 761-68, and rejecting as discordant with admiralty's quest for uniformity the suggestion that state law be, borrowed, the District Court concluded that damages for survivor's grief could not be recovered in a general maritime action for death caused by unseaworthiness. For use in the event we disagreed, the District Judge found that the decedent's family would be entitled to $60,000 for lost love and affection, divided $20,000 to the widow and $10,000 to each of the children. Mrs. Griffith contends that the court erred in refusing to award these additional damages. We agree that survivor's grief damages are not recoverable in a general maritime action, although for somewhat different reasons than those given by the court below. P. 29, 30 (Emphasis supplied)

Although it is true that some of the Courts have "permitted recovery for the monetary value of services the decedent provided and would have continued to provide but for his wrongful death", this is a far cry from allowing the damages allowed by the Court for non pecuniary loss. Value of services is a pecuniary loss which can be calculated by the trier of fact. Loss of love, companionship and affection and consortium are not. See petition of U. S. Steel Corporation cited Supra.

We submit that the dissenting opinion bears careful examination. The minority seems to express in the dissent not only a disagreement with the opinion of the majority, but a concern for the validity of the opinion itself in law. The dissent seems to sound a warning to the majority that an error of far reaching consequence has been committed which should be corrected before irreparable damage occurs to litigants in pending and in future cases.

Consider the following language found in the dissent:

> "Disregarding the source of law endorsed by Moragne, as well as the concern for uniformity expressed in that opinion, the Court has fashioned a new substantive right of recovery in conflict with 'accepted Maritime Law' and a new body of law with regard to the elements of damages recoverable in admiralty wrongful death actions. In my view, these unprecedented extensions of admiralty law exhibit little deference for "stare decisis" or, indeed, for enunciated congressional policy. I also believe these new doctrines are unsound as a matter

of principal, will create difficulty and confusion in the litigation of admiralty cases and are very likely to result in duplicative recoveries." (Page 2, 3).

* * *

"An uninterrupted line of FELA and Jones Act cases going back a half century holds that if the decedent reduces his claim to settlement or judgment prior to his death, or otherwise extinguishes his right to pursue the claim, no subsequent wrongful death action may be brought." (Page 4).

* * *

"But the lack of uniformity produced by the majority's holding should be evident." (Page 7).

* * *

"Aside from the disunity of the law of admiralty inherent in its opinion, I fail to see how the Court can square its sweeping approach with Moragne's reliance on an admonition to draw by analogy from the federal statutes . . . . .Moragne envisioned a process of accommodation with those statutes, not their abrupt and near total forced obsolescence. (Page 7 & 8).

* * *

"Under the great majority of those statutes [wrongful death statutes], whether a survival or true death act character, Mrs. Gaudet's cause

of action would have been foreclosed by her husband's recovery." (Page 8).

* * *

"The Restatement of Torts is also in direct conflict with the position taken by the Court." (Page 9).

* * *

"...I think it important to note that the Court's holding that loss of society may be recovered is a clear example of the majority's repudiation of the congressional purposes expressed in the two Federal Maritime Wrongful Death statutes". (Page 11).

* * *

"The highly conceptualized nature of the parsing of catagories of damages undertaken by the Court suggest how unlikely it is that the majority's theoretical distinctions will be meaningful in practice. And control by way of appellate review of the injustices that are bound to occure will be, practically speaking, an impossible task." (Page 15).

* * *

"The Gaudet family may well then receive substantially more than just compensation for its injuries. One expression of jury sympathy is common place, despite its conflict with the damaged principals that in theory

control. But certainly two opportunities for jury sentiment crosses the line between benignity and bonanza and should not be sanctioned." (Page 15 & 16).

* * *

The Court has also ignored the laws normal regard for an end to duplicative litigation arising from the same transaction." (Pages 16 & 17).

* * *

"There should be strong reasons of policy to justify such repetitive suits and to impose on petitioner the attendant doubling of litigation expenses." (Page 18).

* * *

"In reaching these results, the majority of opinion has discredited, if not in substance overruled, the unaminous decisions of the Court in the Melon and Flynn cases." (Page 18)

Just as Powell concludes the dissent with the following caveat:

"And, unlike the opinion in Moragne, the majority has not provided, in my view, sound reasons of precedent or policy for overturning the rule.: (Page 19).

The dissent also correctly pointed out that recovery for unseaworthiness can be harsh due to the application of strict liability principles.

"The maritime concept of unseaworthiness is not based on fault. The doctrine has evolved into a judicially-created form of strict liability. When the law imposes absolute liability, it often restricts recovery to damages for those injuries that are clearly ascertainable and susceptible to monetary compensation.....This reflects the impossibility of deterrence and the inappropriateness of punishment in many cases where liability is absolute. The Court has broken with that wise rule of social policy in this case. Dissent page 17.

The Fifth Circuit in the Canal Barge case (supra) thoroughly discussed reasons for state statutes allowing recovery for non-pecuniary losses.

"On the other hand, mental grief damages have often been awarded under state death acts for land-based torts, but the differing rationales and factual circumstances underlying allowance of such recovery make difficult the extraction of policies applicable in a maritime context. For example, some courts have apparently upheld survivor's grief damages on the theory that punitive damages are recoverable under the state's wrongful death statute. See, e.g., Sloss-Sheffield Steel & Iron Co. v. Drane, 160 F.780 (5th Cir. 1908); Leahy v. Morgan, 275 F.Supp. 424 (N.D. Iowa 1967). California recognizes psychic injury as an element of damages, but restricts recovery to parents who actually witness the negligently inflicted death of their minor child.

See Dillon v. Legg, 68 Cal.2d 728, 69 Cal.Rptr. 72, 441 P.2d 912 (1968), overruling Amaya v. Home Ice, Fuel & Supply Co., 59 Cal.2d 295, 29 Cal. Rptr. 33, 379 P.2d 513 (1963). Occasionally liberal recovery under state wrongful death acts has been permitted without distinguishing between tangible loss of services and intangible grief. See, e.g., Louisville & N.R. Co. v. Whisenant, 214 Miss. 421, 58 So. 2d 908 (1952) Several state wrongful death statutes allowing recovery for survivor's grief limit the amount recoverable, e.g., W.Va. Code Ann. § 55-7-6, and at least one limits grief recovery to spouses and parents, Md. Code Ann. art. 67, § 4 (Supp. 1972). And one court has upheld survivor's grief damages while denying damages for pecuniary loss. See Gregg v. Coleman, 235 F.Supp. 237 (E.D.S.C. 1964).

Thus, the combining of the strict liability rule under unseaworthiness and the recovery for punitive damages under the state wrongful death acts is a windfall indeed to the plaintiff, but one which has no support or parallel or precedent in the annals of modern jurisprudence. To allow such a result to stand would result in irreparable damage to the judicial system under which litigants must seek the impartial administration of justice.

After careful analysis of the background of the HARRISBURG and the reasons for its adoption into the American legal system, the Moragne court said:

> "The most likely reason that the English rule was adopted in this country without much question is simply that it had the blessing of age." 26 L.Ed. 2d. 348

Hopefully, the majority will grant a rehearing in this matter and refuse to give the "unjustifiable anomaly" resulting from the majority opinion any such blessing.

Respectfully submitted,

McCLENDON, GREENLAND
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BY: _____
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PROOF OF SERVICE

I, Stuart A. McClendon, attorney for defendant and a member of the bar of the Supreme Court of the United States, hereby certify that on this day, I have served copies of the foregoing Petition for Rehearing on:

GEORGE W. REESE, Attorney
627 National Bank of Commerce
New Orleans, Louisiana 70112

by mailing a copy thereof, postage prepaid addressed to his respective office, this 13th day of February, 1974.

CERTIFICATE OF GOOD FAITH

This is to certify that the foregoing Petition for Rehearing is being filed in good faith and not for the purpose of delay.

STUART A. McCLENDON

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 72-1019

SEA-LAND SERVICES, INC.,

Petitioner,

versus

HELEN STEIN GAUDET, ADMINISTRATRIX
OF THE ESTATE OF
AWTREY C. GAUDET, SR.

MOTION FOR PERMISSION TO FILE BRIEF AMICUS CURIAE AND ACCOMPANYING BRIEF

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 72-1019

SEA-LAND SERVICES, INC.,

Petitioner,

versus

HELEN STEIN GAUDET, ADMINISTRATRIX
OF THE ESTATE OF
AWTREY C. GAUDET, SR.

MOTION FOR PERMISSION TO FILE BRIEF
AMICUS CURIAE AND ACCOMPANYING BRIEF

MOTION FOR PERMISSION TO FILE
BRIEF AMICUS CURIAE

On motion of Canal Barge Company, Inc. and on suggesting to this Court that it is an Inland River Towing Company and a successful Appellant in the Fifth Circuit in a case involving similar legal issues to those in the instant case, which decision is reported at 480 F. 2d 11, but that although the decision in its case was reported June 29, 1973 it was not originally called to this Court's attention and in the original brief filed in this Court by Petitioner the law of the Fifth Circuit regarding damages recoverable under Moragne v. States Marine Lines was contrary to the actual law of the Fifth

Circuit as announced by the Court in the cited opinion;

That the mandate of the Fifth Circuit in Mover's case has been stayed pending a decision by the Court en banc in the cases of Johnson v. Penrod Drilling Co., 478 F. 2d 1208 and Starnes v. Penrod Drilling Co., 478 F. 2d 1208;

That additionally, Mover's case involves a Jones Act death claim in which the District Court and the Appellate Court have sifted the type of damages recoverable, and both courts denied recovery for anything but pecuniary loss denying recovery for loss of love and affection under Moragne v. States Marine Lines.

Mover has agreement of Petitioner to file a brief supporting rehearing but has not been able to reach all attorneys in the case; and

Therefore, Mover is filing this motion simultaneously with Petitioner's application for rehearing and is uncertain that Petitioner will cover all issues in its brief for rehearing and therefore requests permission to file the accompanying brief in support of the rehearing petition on this important legal issue of national concern.

Respectfully submitted,

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Carrere & Denegre
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Attorneys for Canal Barge Company, Inc.

CERTIFICATE

I hereby certify that a copy of the above and foregoing Motion has been mailed to counsel of record by depositing same in the U. S. Mail, postage prepaid, this 14th day of February, 1974.

ROBERT B. ACOMB, JR.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 72-1019

SEA-LAND SERVICES, INC.,

Petitioner,

versus

HELEN STEIN GAUDET, ADMINISTRATRIX
OF THE ESTATE OF
AWTREY C. GAUDET, SR.

ALL APPELLATE POST-MORAGNE CASES THAT HAVE SIFTED RECOVERY RIGHTS HAVE UNIFORMLY DENIED LOSS OF LOVE AND AFFECTION AND LIMITED RECOVERY TO PECUNIARY LOSS AS PERMITTED BY CONGRESS UNDER JONES ACT AND DEATH ON THE HIGH SEAS ACT

The Court's opinion adopts a recovery of damage view permitting the recovery of loss of "society" which embraces an even broader concept of damages than simply loss of love and affection. Naturally, this Court is the final arbitor of the damages that are recoverable, but as pointed out in the Moragne decision by the Court, the parameters of the type of damages recoverable would not be determined until the issues fully sifted through the lower federal levels. In the instant case

the issue involving loss of love and affection or loss of companionship was never decided by any of the lower courts and therefore the record in this case may not form the basis of judicial expression that may have been contemplated by the Moragne decision.

It is interesting to note that in every one of the federal appellate decisions on the subject, prior to this Court's decision that the Circuits have uniformly rejected the view that recovery could be had for anything but pecuniary loss. In the Petition of Canal Barge, 480 F.2d 11, (5th Cir. 1973) the Fifth Circuit made an extensive review of the jurisprudence and adopted the view of the Ninth and Sixth Circuits which denied recovery for loss of society, companionship and love and affection. See Simpson v. Knutsen, O.A.S. 444 F. 2d 523 (9th Cir. 1971); In Re United States Steel Corporation, 436 F.2d 1256 (6th Cir. 1970); Lamp v. United States Steel Corporation, 402 U.S. 987 1971); Green v. Vantage SS Corp., 466 F.2d 159 (4th Cir.1972). In fact, the majority of all federal cases have rejected this theory and even in the number of instances the state courts have deferred to the federal statutes such as the Death on the High Seas Act and/or the Jones Act for authority. See Guilbeau v. Calzada, 240 So. 2d 104 (La. App. 4th Cir.1970). In In Re Canal Barge Company, Inc., supra, the Fifth Circuit opinion at Page 32 states as follows:

> "Yet research indicates that under none of these statutes have mental grief damages been awarded for maritime deaths, and construction of their liberal damage provisions in a maritime context remains undisclosed. On the other hand, mental grief damages have often

> been awarded under state death acts for land-based torts, but the differing rationales and factual circumstances underlying allowance of such recovery make difficult the extraction of policies applicable in a marine context. For example, some courts have apparently upheld survivors grief damages on the theory that punitive damages are recoverable under the state's wrongful death statutes. . . .
>
> California recognizes psychic injury as an element of damages, but restricts recovery to parents who actually witnesses a negligently inflicted death of their minor child. . . .
>
> Occasionally, liberal recovery under state wrongful death acts has been permitted without distinguishing between tangible loss of services and intangible grief. . . .
>
> Several state wrongful death statutes allowing recovery for survivors' grief limit the amount recoverable, e.g., West Virginia Code Annotated 55-76 and at least one limits grief recovery to spouses and parents, Md. Code Ann. Art. 67, §4 (Supplement 1972). And one court has upheld survivors grief damages while denying damages for pecuniary loss. . . ."

Naturally, when the issue is ultimately decided by this Court then it will be the final decision relative to these areas. However, since every Circuit Court of Appeal within the federal system has rejected this

concept of damages, we submit that perhaps a reconsideration of this issue would be proper in the light of the later reported federal decisions and particularly those decisions not previously cited to the Court. The judicial logic for the rejection of anything but pecuniary damages is thoroughly covered in the written opinions and we will not attempt to restructure the arguments. Suffice is it to report that every reported case on an Appellate level stands on record against the liberal view expressed by the minority of the District Courts and a few legal commentators.

CONGRESS HAS REJECTED UNSEAWORTHINESS DOCTRINE AS A BASIS FOR RECOVERY BY NON-SEAMEN

This Court in Moragne vs. States Marine Lines, 398 U.S. 375 recognized that Congress had provided a right of recovery for wrongful death under the Jones Act and under the Death on the High Seas Act. The opinion indicates that under Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) a remedy was created in favor of longshoremen performing the work traditionally performed by seamen and extended to them the right to recover for injuries resulting from unseaworthiness. Later in the case of Tungus v. Skovgaard, 358 U.S. 588 (195) the Court recognized that the unseaworthiness remedy could be used in death cases provided that the state Wrongful Death statutes were sufficiently broad to encompass a seaworthiness claim. Nothing indicating congressional intent since 1920 was before the Court.

However, since Moragne and prior to the Court's decision in Gaudet Congress has enacted Public Law 92-576 of the 92nd Congress dated October 27, 1972. That statute clearly

abolishes the unseaworthiness concept developed by this Court in Sieracki as a basis of recovery by injured longshoremen aboard vessels. The committee hearings in Congress specifically reject the unseaworthiness concept of both Sieracki and Ryan and in Senate Report No. 92-1125, Calendar No. 1067 dated September 12, 1972 it is stated at Page 8:

> "The Committee also rejected a thesis that a vessel should be liable without regard to its fault for injuries sustained by employees covered under this Act while working on board the vessel. Vessels have been held to what amounts to such absolute liability by decisions of the Supreme Court, commencing with Seas Shipping Co. v. Sieracki, 328 U.S. 25 (1956). . ."

And at Page 10 it states as follows:

> "In reaching this conclusion, the Committee has noted that the seaworthiness concept was developed by the courts to protect seamen from the extreme hazards incident to their employment which frequently require long sea voyages and duties of obedience to orders not generally required of other workers. The rationale which justifies holding a vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board the vessel while it is in port."

The Committee report specifically states that the purpose of the amendments is to place an employee injured aboard a vessel in

the same position as he would be if he were injured in non-maritime employment ashore. Insofar as bringing a third-party damage action is concerned, the worker is not to be endowed with any special maritime theory of liability or cause of action under whatever judicial nomenclature is involved called unseaworthiness or otherwise.

Thus, it is submitted Congress has by the 1972 amendment to the Longshoremen's Act indicated a clear congressional intent that unseaworthiness as a cause of action is no longer applicable and perhaps claims such as presented on behalf of the Gaudets in this case will no longer constitute recoverable claims under the general maritime law. Since Moragne is based upon the warranty of seaworthiness its judicial foundation may be removed by the Longshoremen Amendment and the progeny of Moragne may be eliminated by the evaporation of the seaworthiness doctrine.

CONCLUSION

It is respectfully submitted that the decision in this case is one of extreme national importance to all maritime interests;

That since the Moragne decision by the Court, Congress has held extensive hearings and indicated a strong public policy contrary to the Seaworthiness Doctrine which this Court may wish to consider;

That all Appellate cases that have reviewed damages recoverable under Moragne have denied recovery for loss of love and affection; and that,

Accordingly, Canal Barge Company, Inc.

respectfully suggests that the petition for rehearing in this case should be granted an the Court should recall its previous opinio and follow the maritime law rule adopted by Congress and limit recovery in wrongful dea cases under Moragne to actual pecuniary los

Respectfully submitted,

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C E R T I F I C A T E

I hereby certify that a copy of the above and foregoing has been mailed to coun sel of record by depositing same in the U.S Mail, postage prepaid, this 14th day of February, 1974.

Robert B. Acomb, Jr.

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SEA-LAND SERVICES, INC. v. GAUDET, ADMINISTRATRIX

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 72–1019. Argued November 7, 1973—Decided January 21, 1974

Respondent's husband, a longshoreman, was severely injured aboard petitioner's vessel in Louisiana navigable waters. Shortly after termination of an action based on unseaworthiness, in which he recovered damages for past and future wages, pain and suffering, and medical and incidental expenses, the husband died and respondent brought this maritime wrongful-death action for damages suffered by her. The District Court dismissed respondent's suit on grounds of *res judicata* and failure to state a claim. The Court of Appeals reversed, on the basis of *Moragne* v. *States Marine Lines*, 398 U. S. 375. *Held:* Respondent's maritime wrongful-death action is not barred by decedent's recovery in his lifetime for damages for his personal injuries. Pp. 575–595.

(a) *Moragne* v. *States Marine Lines*, *supra*, created a true wrongful-death remedy that is founded upon the death itself and is independent of any action the decedent may have had for his own personal injuries, and because respondent's suit thus involves a different cause of action from decedent's, it is not precluded by *res judicata*. Pp. 575–583.

(b) The maritime wrongful-death remedy permits a decedent's dependents to recover damages for loss of support, services, and society, as well as damages for funeral expenses. Pp. 583–591.

(c) All but the first of the foregoing elements of damages could not accrue until the decedent's death and therefore could not subject petitioner to double liability. Though there is an apparent overlap between a decedent's recovery for loss of future wages and the dependents' subsequent claim for support, the doctrine of collateral estoppel would bar dependents from recovering for loss of support to the extent that the decedent had recovered for future wages. Pp. 591–595.

463 F. 2d 1331, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, WHITE, MARSHALL, and BLACKMUN, JJ., joined. POWELL, J.,

filed a dissenting opinion, in which BURGER, C. J., and STEWART and REHNQUIST, JJ., joined, *post*, p. 595.

Stuart A. McClendon argued the cause for petitioner. On the brief was *Richard L. Greenland.*

George W. Reese argued the cause for respondent. With him on the brief was *George M. Leppert.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Moragne v. *States Marine Lines*, 398 U. S. 375 (1970), overruling *The Harrisburg*, 119 U. S. 199 (1886), held that an action for wrongful death based on unseaworthiness is maintainable under federal maritime law, but left the shaping of the new nonstatutory action to future cases. The question in this case is whether the widow of a longshoreman may maintain such an action for the wrongful death of her husband—alleged to have resulted from injuries suffered by him while aboard a vessel in navigable waters—after the decedent recovered damages in his lifetime for his injuries.

Respondent's husband suffered severe injuries while working as a longshoreman aboard petitioner's vessel, the S. S. *Claiborne*, in Louisiana navigable waters. He recovered $140,000 for his permanent disability, physical agony, and loss of earnings in an action based on unseaworthiness,[1] but died shortly after the action was terminated. Respondent brought this wrongful-death action in the District Court for the Eastern District of Louisiana for damages suffered by her. Based on her husband's recovery, the District Court dismissed the widow's suit on grounds of *res judicata* and failure to state a claim. The Court of Appeals for the Fifth Circuit reversed, holding that *Moragne* gave "Mrs. Gaudet . . . a compen-

[1] The jury reduced a verdict of $175,000 by 20% because of decedent's contributory negligence.

sable cause of action for Mr. Gaudet's death wholly apart from and not extinguished by the latter's recovery for his personal injuries . . . ." 463 F. 2d 1331, 1332 (1972). We granted certiorari, 411 U. S. 963 (1973), and now affirm.

I

The harshness of the *Harrisburg* rule that in the absence of a statute, there is no maritime action for wrongful death, was only partially relieved by enactment of federal and state wrongful-death statutes.[2] The Death

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[2] Wrongful-death statutes are to be distinguished from survival statutes. The latter have been separately enacted to abrogate the common-law rule that an action for tort abated at the death of either the injured person or the tortfeasor. Survival statutes permit the deceased's estate to prosecute any claims for personal injury the *deceased* would have had, but for his death. They do not permit recovery for harms suffered by the deceased's family as a result of his death. See *Michigan C. R. Co.* v. *Vreeland*, 227 U. S. 59 (1913); Schumacher, Rights of Action Under Death and Survival Statutes, 23 Mich. L. Rev. 114 (1924) (hereafter Schumacher); Winfield, Death as Affecting Liability in Tort, 29 Col. L. Rev. 239 (1929); Livingston, Survival of Tort Actions, A Proposal for California Legislation, 37 Calif. L. Rev. 63 (1949); New York Law Revision Commission Report 157 *set seq.* (1935). The underlying reasons for survival statutes have been summarized by Professor Harper:

"At early common law, the personal representative could not be sued for a tort committed by the decedent during his lifetime. From early notions of the untransmittability of blame—and the quasi-criminal nature of early tort law must not be forgotten—to the crystallization of the maxim actio personalis moritur cum persona, the common law was developed without exception, and the rule was uniform that tort actions died with the parties, either wrongdoer or injured party. There was, then, no survival of a right of action either in favor of or against an executor or administrator until statutes modified somewhat the rule of dependability upon the lives of the original parties to the wrong." F. Harper, Law of Torts 673–674 (1933), quoted in 2 F. Harper & F. James, Law of Torts § 24.1 n. 2 (1956) (hereafter Harper & James). Survival statutes, in one form or another, have been enacted in over one-half the States and

on the High Seas Act, 41 Stat. 537, 46 U. S. C. §§ 761–768, created a wrongful-death action for death outside the three-mile limit.[3] The Jones Act, 41 Stat. 1007, 46 U. S. C. § 688, incorporating the Federal Employers' Liability Act, 35 Stat. 65, 45 U. S. C. §§ 51–60, established such an action based on negligence for the wrongful death of a seaman regardless of the situs of the wrong; but otherwise, wrongful-death actions for deaths occurring on navigable waters within the three-mile territorial waters of a State depended upon whether the State had enacted a wrongful-death statute and, if so, whether the statute permitted recovery.[4]

Moragne reflected dissatisfaction with this state of the law that illogically and unjustifiably deprived the dependents of many maritime death victims of an adequate remedy for their losses. Three clearly unjust consequences were of particular concern:

> "The first of these is simply the discrepancy produced whenever the rule of *The Harrisburg* holds sway: within territorial waters, identical conduct violating federal law (here the furnishing of an unseaworthy vessel) produces liability if the victim is merely injured, but frequently not if he is killed. . . .
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> "The second incongruity is that identical breaches of the duty to provide a seaworthy ship, resulting in death, produce liability outside the three-mile

supplement the state wrongful-death statutes, see W. Prosser, The Law of Torts § 126, p. 900 (4th ed. 1971) (hereafter Prosser), though in a small number of States the survival statute provides the only death remedy available, see 2 Harper & James § 24.2, p. 1288. The Federal Employers' Liability Act, 45 U. S. C. § 59, and the Jones Act, 46 U. S. C. § 688, but not the Death on the High Seas Act, 46 U. S. C. § 761, contain survival provisions.

[3] *Kernan* v. *American Dredging Co.*, 355 U. S. 426, 430 n. 4 (1958).

[4] *The Tungus* v. *Skovgaard*, 358 U. S. 588 (1959).

limit—since a claim under the Death on the High Seas Act may be founded on unseaworthiness, see *Kernan* v. *American Dredging Co.*, 355 U. S. 426, 430 n. 4 (1958)—but not within the territorial waters of a State whose local statute excludes unseaworthiness claims. . . .

"The third, and assertedly the 'strangest' anomaly is that a true seaman—that is, a member of a ship's company, covered by the Jones Act—is provided no remedy for death caused by unseaworthiness within territorial waters, while a longshoreman, to whom the duty of seaworthiness was extended only because he performs work traditionally done by seamen, does have such a remedy when allowed by a state statute (footnote omitted)." 398 U. S., at 395–396.

In overruling *The Harrisburg*, *Moragne* ended these anomalies by the creation of a uniform federal cause of action for maritime death, designed to extend to the dependents of maritime wrongful-death victims admiralty's "special solicitude for the welfare of those men who under[take] to venture upon hazardous and unpredictable sea voyages." *Moragne, supra*, at 387. Our approach to the resolution of the issue before us must necessarily be consistent with the extension of this "special solicitude" to the dependents of the seafaring decedent.

Petitioner, Sea-Land Services, Inc. (Sea-Land), would attach no significance to this extension in shaping the maritime wrongful-death remedy. It argues that the wrongful-death remedy should recognize no loss independent of the decedent's claim for his personal injuries, and therefore that respondent had a wrongful-death remedy only "in the event Gaudet failed to prosecute [his own claim] during his lifetime." Brief for Petitioner 6. But *Moragne* had already implicitly rejected that argu-

ment; for we there recognized that a single tortious act might result in two distinct, though related harms, giving rise to two separate causes of action: "in the case of mere injury, the person physically harmed is made whole for his harm, while in the case of death, those closest to him—usually spouse and children—seek to recover for their total loss of one on whom they depended." 398 U. S., at 382. Thus, *Moragne* created a true wrongful-death remedy—founded upon the death itself and independent of any action the decedent may have had for his own personal injuries.[5] Because the respondent's suit involves a different cause of action, it is not precluded by *res judicata*. For *res judicata* operates only to bar

> "repetitious suits involving the same cause of action. [The bar] rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction

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[5] Most wrongful-death statutes have also been construed to create an independent cause of action in favor of the decedent's dependents, see F. Tiffany, Death by Wrongful Act § 23 (2d ed. 1913) (hereafter Tiffany); 2 Harper & James § 24.2; Schumacher 121. Thus, for example, Coleridge, J., said of England's Lord Campbell's Act, "[I]t will be evident that this Act does not transfer this right of action to [the decedent's] representative, but gives to the representative a totally new right of action, on different principles," *Blake* v. *Midland R. Co.*, 18 Q. B. (Ad. & E., N. S.) *93, *110, 118 Eng. Rep. 35, 41 (1852). See also *Seward* v. *The Vera Cruz*, 10 App. Cas. 59, 70 (Lord Blackburn). Interpreting the wrongful-death provisions of the Federal Employers' Liability Act, 45 U. S. C. §§ 51–60, this Court described the action as "independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had,—one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by relatives dependent upon the decedent," *Michigan C. R. Co.* v. *Vreeland*, 227 U. S., at 68.

> has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' *Cromwell* v. *County of Sac*, 94 U. S. 351, 352. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. See Von Moschzisker, 'Res Judicata,' 38 Yale L. J. 299; Restatement of the Law of Judgments, §§ 47, 48." *Commissioner* v. *Sunnen*, 333 U. S. 591, 597 (1948).

To be sure, a majority of courts interpreting state and federal wrongful-death statutes have held that an action for wrongful death is barred by the decedent's recovery for injuries during his lifetime. But the bar does not appear to rest in those cases so much upon principles of *res judicata* or public policy as upon statutory limitations on the wrongful-death action. As one authority has noted, "[t]he fact that all civil remedies for wrongful death derive from statute has important consequences. Since the right was unknown to common law, the legislatures which created the right were free to impose restrictions upon it." 2 F. Harper & F. James, The Law of Torts § 24.1, p. 1285 (1956). Thus, England's Lord Campbell's Act,[6] the first wrongful-death statute, per-

[6] Lord Campbell's Act, 9 & 10 Vict., c. 93, An Act for compensating the Families of Persons killed by Accidents (Aug. 26, 1846):

"Whereas no Action at Law is now maintainable against a Person who by his wrongful Act, Neglect, or Default may have caused the Death of another Person . . . : Be it therefore enacted . . . That whensoever the Death of a Person shall be caused by wrongful Act,

mits recovery "whensoever the Death of a Person shall be caused by [the] wrongful Act . . . [of another] and the Act . . . is such as would (if Death had not ensued) have entitled the Party injured to maintain an Action and recover Damages in respect thereof . . . ." Early English cases interpreting the Act held that this language conditioned wrongful-death recovery upon the existence of an actionable cause of the decedent at his death; [7] if

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Neglect, or Default, and the Act, Neglect, or Default is such as would (if Death had not ensued) have entitled the Party injured to maintain an Action and recover damages in respect thereof, then and in every such Case the Person who would have been liable if Death had not ensued shall be liable to an Action for Damages, notwithstanding the Death of the Person injured, and although the Death shall have been caused under such Circumstances as amount in Law to Felony.

"II. And be it enacted, That every such Action shall be for the Benefit of the Wife, Husband, Parent, and Child of the Person whose Death shall have been so caused, and shall be brought by and in the Name of the Executor or Administrator of the Person deceased; and in every such Action the Jury may give such Damages as they may think proportioned to the Injury resulting from such Death to the Parties respectively for whom and for whose Benefit the Action shall be brought . . . .

"III. Provided always, and be it enacted, That not more than One Action shall lie for and in respect of the same Subject Matter of Complaint . . . ."

[7] See, *e. g.*, *Read* v. *Great Eastern R. Co.*, L. R. 3 Q. B. 555, 558, in which the court held that

"[t]he question turns upon the construction of s. 1 of 9 & 10 Vict. (Lord Campbell's Act), c. 93. Before that statute the person who received a personal injury, and survived its consequences, could bring an action, and recover damages for the injury; but if he died from its effects, then no action could be brought. To meet this state of the law the 9 & 10 Vict. c. 93, was passed, and 'whenever the death of a person is caused by a wrongful act, and the act is such as would, if death had not ensued, have entitled the party injured to maintain an action, and recover damages in respect thereof, then . . . the person who would have been liable if death had not ensued shall be liable for an action for damages notwithstanding the death of the

the deceased had reduced his claim to judgment, settled with or released his tortfeasor, and therefore up to the time he died could not have maintained a further action for his injuries, his dependents could have no cause of action for his wrongful death. Since Lord Campbell's Act became the prototype of American wrongful-death statutes, most state statutes contained nearly identical language and have been similarly interpreted by state

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party injured.' Here, taking the plea to be true, the party injured could not 'maintain an action in respect thereof,' because he had already received satisfaction."

[8] See, *e. g.*, *Legg.* v. *Britton*, 64 Vt. 652, 24 A. 1016 (1892); *Melitch* v. *United R. & E. Co.*, 121 Md. 457, 88 A. 229 (1913). This interpretation has been by no means universal. A number of courts interpreting Lord Campbell's Act-type state wrongful-death statutes have held that a wrongful-death action could be prosecuted even though before his death the decedent could not have brought a cause of action for his personal injuries because he had already recovered a judgment, settled, or released his claims. A classic statement of this view is that of the South Dakota Supreme Court in *Rowe* v. *Richards*, 35 S. D. 201, 215–216, 151 N. W. 1001, 1006 (1915):

"We must confess our inability to grasp the logic of any course of so-called reasoning through which the conclusion is drawn that the husband simply because he may live to suffer from a physical injury and thus become vested with a cause of action for the violation of his own personal right, has an implied power to release a cause of action—one which has not then accrued; one which may never accrue; and one which from its very nature cannot accrue until his death; and one which, if it ever does accrue, will accrue in favor of his wife and be based solely upon a violation of a right vested solely in the wife."

The contrary interpretation of the pertinent statutory language has also been the subject of scholarly criticism. Professor Prosser argues: "It is not at all clear, however, that such provisions of the death acts ever were intended to prevent recovery where the deceased once had a cause of action, but it has terminated before his death. The more reasonable interpretation would seem to be that they are directed at the necessity of some original tort on the part of the defendant, under circumstances giving rise to liability in the

courts.[8] Though the federal wrongful-death statutes do not contain the same controversial language, the FELA, at least, has been held to be "essentially identical with" Lord Campbell's Act, *Michigan C. R. Co.* v. *Vreeland*, 227 U. S. 59, 69 (1913), and therefore similar restrictions have been placed on FELA wrongful-death recovery. *Mellon* v. *Goodyear*, 277 U. S. 335, 345 (1928).[9]

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first instance, rather than to subsequent changes in the situation affecting only the interest of the decedent." Prosser § 127, p. 911. See also Schumacher 120–121; Fleming, The Lost Years: A Problem in the Computation and Distribution of Damages, 50 Calif. L. Rev. 598, 608–610 (1962); Anno., 70 Am. St. Rep. 666, 684 (1898). In States where the limiting language of Lord Campbell's Act is absent from the wrongful-death statute, the courts have permitted wrongful-death actions although the decedent had already recovered for his own injuries, see, *e. g.*, *Blackwell* v. *American Film Co.*, 189 Cal. 689, 693–694, 209 P. 999, 1001 (1922).

[9] Beyond the common elements that the FELA may share with Lord Campbell's Act, express statutory terms peculiar to the FELA lend additional support for the result reached in *Mellon* v. *Goodyear*. The Act provides:

"Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, *or*, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence . . . of such carrier, or by reason of any defect or insufficiency, due to its negligence . . . ." 45 U. S. C. § 51 (emphasis added).

The significant language, of course, is the use of the disjunctive "or." This language was understood by the Court of Appeals for the Fifth Circuit in *Seaboard Air Line R. Co.* v. *Oliver*, 261 F. 1, 2 (1919): "The two distinct rights of action are given in the alternative or disjunctively. The language used indicates the absence of an intention to allow recoveries for the same wrong by both the injured employé and, in case of his death, by his personal representative; only one

Moragne, on the other hand, requires that the shape of the new maritime wrongful-death remedy (not a statutory creation but judge-made, see *The Tungus* v. *Skovgaard*, 358 U. S. 588, 611 (1959) (opinion of BRENNAN, J.)) be guided by the principle of maritime law that "certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules," *The Sea Gull*, 21 F. Cas. 909 (No. 12,578) (C. C. Md. 1865), quoted in *Moragne*, 398 U. S., at 387. Since the policy underlying the remedy is to insure compensation of the dependents for *their* losses resulting from the decedent's death, the remedy should not be precluded merely because the decedent, during his lifetime, is able to obtain a judgment for his own personal injuries. No statutory language or "established and inflexible rules" of maritime law require a contrary conclusion.[10]

II

Sea-Land argues that, if dependents are not prevented from bringing a separate cause of action for wrongful death in cases where the decedent has already received a judgment for his personal injuries, then necessarily it

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recovery being allowed when the injured employé dies without having enforced the right of action given to him. It seems to be a fair inference from that language that the right of action given to the injured employé's personal representative was intended to be unenforceable after the enforcement and satisfaction of the one given to the employé himself."

[10] Significantly, the Death on the High Seas Act, 46 U. S. C. § 761, the only federal statute "that deals specifically and exclusively with actions for wrongful death . . . for breaches of the duties imposed by general maritime law," *Moragne* v. *States Marine Lines*, 398 U. S. 395, 407 (1970), has not been interpreted, as the FELA has been, to bar wrongful-death recovery in cases where the decedent has already recovered during his lifetime for his personal injuries.

will be subject to double liability. In order to evaluate this argument it is necessary first to identify the particular harms suffered by the dependents, for which the maritime wrongful-death remedy permits recovery of damages. In identifying these compensable harms, we are not without useful guides; for in *Moragne* we recognized that with respect to "particular questions of the measure of damages, the courts will not be without persuasive analogy for guidance. Both the Death on the High Seas Act and the numerous state wrongful-death acts have been implemented with success for decades. The experience thus built up counsels that a suit for wrongful death raises no problems unlike those that have long been grist for the judicial mill." 398 U. S., at 408. Our review of those authorities, and the policies of maritime law, persuade us that, under the maritime wrongful-death remedy, the decedent's dependents may recover damages for their loss of support, services, and society, as well as funeral expenses.

Recovery for loss of support has been universally recognized,[11] and includes all the financial contributions

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[11] See, *e. g.*, *Michigan C. R. Co.* v. *Vreeland*, 227 U. S., at 70; *The S. S. Black Gull*, 90 F. 2d 619 (CA2 1937) (interpreting the Death on the High Seas Act); *Dugas* v. *National Aircraft Corp.*, 438 F. 2d 1386 (CA3 1971) (interpreting the Death on the High Seas Act); Tiffany §§ 153, 160; S. Speiser, Recovery for Wrongful Death § 3.4 (1966) (hereafter Speiser); Prosser § 127, p. 906. Damages for loss of support have also been awarded consistently in post-*Moragne* maritime wrongful-death actions. See, *e. g.*, *Dennis* v. *Central Gulf S. S. Corp.*, 323 F. Supp. 943 (ED La. 1971), aff'd, 453 F. 2d 137 (CA5 1972); *Petition of United States Steel Corp.*, 436 F. 2d 1256 (CA6 1970); *In re Cambria S. S. Co.*, 353 F. Supp. 691 (ND Ohio 1973); *Mascuilli* v. *United States*, 343 F Supp. 439 (ED Pa. 1972); *In re Sincere Navigation Corp.*, 329 F. Supp. 652 (ED La. 1971); *Petition of Canal Barge Co.*, 323 F. Supp. 805 (ND Miss. 1971).

that the decedent would have made to his dependents had he lived. Similarly, the overwhelming majority of state wrongful-death acts[12] and courts interpreting the Death on the High Seas Act[13] have permitted recovery for the monetary value of services the decedent provided and would have continued to provide but for his wrongful death.[14] Such services include, for example, the nurture, training, education, and guidance that a child would have received had not the parent been wrongfully killed.[15] Services the decedent performed at home or for his spouse are also compensable.[16]

Compensation for loss of society, however, presents a closer question. The term "society" embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection.[17] Unquestionably, the deprivation of these

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[12] Tiffany §§ 158–164; Speiser §§ 3.36, 3.40.

[13] *Moore-McCormack Lines, Inc.* v. *Richardson*, 295 F. 2d 583 (CA2 1961); *Dugas* v. *National Aircraft Corp., supra; Carli* v. *New London Flying Service, Inc.*, 1965 AMC 1644 (DC Conn. 1962).

[14] Such damages have also been recovered in post-*Moragne* maritime wrongful-death actions. See, *e. g., Dennis* v. *Central Gulf S. S. Corp., supra; Petition of United States Steel Corp., supra; In re Cambria S. S. Co., supra; Mascuilli* v. *United States, supra; In re Sincere Navigation Corp., supra; Petition of Canal Barge Co., supra.*

[15] See, *e. g., Michigan C. R. Co.* v. *Vreeland, supra*, at 71; *Moore-McCormack Lines, Inc.* v. *Richardson, supra; Gaydos* v. *Domabyl*, 301 Pa. 523, 152 A. 549 (1930).

[16] See, *e. g., Michigan C. R. Co.* v. *Vreeland, supra*, at 71, 74; *Carli* v. *New London Flying Service, Inc., supra; Alden* v. *Norwood Arena, Inc.*, 332 Mass. 267, 124 N. E. 2d 505 (1955); *Kroeger* v. *Safranek*, 165 Neb. 636, 87 N. W. 2d 221 (1957).

[17] Loss of society must not be confused with mental anguish or grief, which are not compensable under the maritime wrongful-death remedy. The former entails the loss of positive benefits, while the

benefits by wrongful death is a grave loss to the decedent's dependents. Despite this fact, a number of early wrongful-death statutes were interpreted by courts to preclude recovery for these losses on the ground that the statutes were intended to provide compensation only for "pecuniary loss," and that the loss of society is not such an economic loss.[18] Other wrongful-death statutes contain express language limiting recovery to pecuniary losses; [19] for example, the Death on the High

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latter represents an emotional response to the wrongful death. The difference between the two is well expressed as follows:

"When we speak of recovery for the beneficiaries' mental anguish, we are primarily concerned, not with the benefits they have lost, but with the issue of compensating them for their harrowing experience resulting from the death of a loved one. This requires a somewhat negative approach. The fundamental question in this area of damages is what deleterious effect has the death, as such, had upon the claimants? In other areas of damage, we focus on more positive aspects of the injury such as what would the decedent, had he lived, have *contributed* in terms of support, assistance, training, comfort, consortium, etc. . . .

. . . . . .

"The great majority of jurisdictions, including several which do allow damages for other types of nonpecuniary loss, hold that the grief, bereavement, anxiety, distress, or mental pain and suffering of the beneficiaries may not be regarded as elements of damage in a wrongful death action." Speiser § 3.45, p. 223 (emphasis in original) (footnotes omitted).

[18] Lord Campbell's Act, which, by its terms, allows the jury to award "such damages as they may think proportional to the injury," was interpreted to permit recovery only for "pecuniary losses," *Blake* v. *Midland R. Co.*, 18 Q. B. (Ad. & E., N. S.) *93, 118 Eng. Rep. 35 (1852). Most American courts, interpreting similar wrongful-death statutes, followed suit, see, *e. g.*, *Michigan C. R. Co.* v. *Vreeland*, *supra*, at 70. See also Speiser § 3.1.

[19] A list of the States that have such statutes and reprints of the individual statutes may be found in Speiser § 3.1, p. 58 n. 5, and Appendix.

Seas Act limits recovery to "a fair and just compensation for the *pecuniary* loss sustained by the persons for whose benefit the suit is brought . . . ," 46 U. S. C. § 762 (emphasis added), and consequently has been construed to exclude recovery for the loss of society.[20]

A clear majority of States, on the other hand, have rejected such a narrow view of damages, and, either by express statutory provision or by judicial construction, permit recovery for loss of society.[21] This expansion of damages recoverable under wrongful-death statutes to include loss of society has led one commentator to observe that "[w]hether such damages are classified as 'pecuniary,' or recognized and allowed as non-pecuniary, the recent trend is unmistakably in favor of permitting such recovery." S. Speiser, Recovery for Wrongful Death 218 (1966). Thus, our decision to permit recovery for loss of society aligns the maritime

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[20] See, *e. g.*, *Middleton* v. *Luckenbach S. S. Co., Inc.*, 70 F. 2d 326 (CA2 1934); *First Nat. Bank in Greenwich* v. *National Airlines, Inc.*, 288 F. 2d 621 (CA2 1961).

[21] The various state and federal wrongful-death statutes have been closely canvassed and catalogued in Speiser (Supp. 1972) and Comment, Wrongful Death Damages in North Carolina, 44 N. C. L. Rev. 402 (1966). Those sources indicate that 27 of the 44 state and territorial wrongful-death statutes which measure damages by the loss sustained by the beneficiaries, permit recovery for loss of society. Alaska, Arkansas, Florida, Hawaii, Kansas, Mississippi, Nevada, West Virginia, Wisconsin, and Wyoming have statutes expressly providing for such damages. Arizona, Idaho, Louisiana, New Mexico, Puerto Rico, South Carolina, Utah, Virginia, and Washington have equivocal statutory language that has been judicially interpreted to include recovery for loss of society. Finally, the wrongful-death statutes of California, Delaware, Michigan, Minnesota, Montana, Pennsylvania, Texas, and the Virgin Islands, which either expressly or by judicial construction limit recovery to pecuniary losses, have been judicially interpreted, nevertheless, to permit recovery for the pecuniary value of the decedent's society.

wrongful-death remedy with a majority of state wrongful-death statutes.[22] But in any event, our decision is compelled if we are to shape the remedy to comport with the humanitarian policy of the maritime law to show "special solicitude" for those who are injured within its jurisdiction.[23]

Objection to permitting recovery for loss of society often centers upon the fear that such damages are somewhat speculative and that factfinders will return

[22] We recognize, of course, that our decision permits recovery of damages not generally available under the Death on the High Seas Act. Traditionally, however, "Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law," *Fitzgerald* v. *United States Lines Co.*, 374 U. S. 16, 20 (1963). The scope and content of the general maritime remedy for wrongful death established in *Moragne* is no exception. After combing the legislative history of the Death on the High Seas Act, we concluded in *Moragne* that Congress expressed "no intention . . . of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law." 398 U. S., at 400. Nothing in the legislative history of the Act suggests that Congress intended the Act's statutory measure of damages to pre-empt any additional elements of damage for a maritime wrongful-death remedy which this Court might deem "appropriate to effectuate the policies of general maritime law." To the contrary, Congress' insistence that the Act not extend to territorial waters, see S. Rep. No. 216, 66th Cong., 1st Sess., 3 (1919); H. R. Rep. No. 674, 66th Cong., 2d Sess., 3 (1920); 59 Cong. Rec. 4482–4486 (1920), indicates that Congress was not concerned that there be a uniform measure of damages for wrongful deaths occurring within admiralty's jurisdiction, for in many instances state wrongful-death statutes extending to territorial waters provided a more liberal measure of damages than the Death on the High Seas Act. See *Greene* v. *Vantage S. S. Corp.*, 466 F. 2d 159 (CA4 1972).

[23] Insofar as *Simpson* v. *Knutsen*, 444 F. 2d 523 (CA9 1971), and *Petition of United States Steel Corp.*, 436 F. 2d 1256 (CA6 1970), are inconsistent with our holding, we disagree.

excessive verdicts.[24] We were not unaware of this objection in *Moragne*, where we said,

> "[O]ther courts have recognized that calculation of the loss sustained by dependents or by the estate of the deceased, which is required under most present wrongful-death statutes . . . does not present difficulties more insurmountable than assessment of damages for many nonfatal personal injuries." 398 U. S., at 385.

For example, juries are often called upon to measure damages for pain and suffering, mental anguish in disfigurement cases, or intentional infliction of emotional harm. In fact, since the 17th century, juries have assessed damages for loss of consortium—which encompasses loss of society—in civil actions brought by husbands whose wives have been negligently injured.[25]

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[24] Of course, the maritime wrongful-death remedy is an admiralty action ordinarily tried to the court and not a jury. There are instances, however, where the admiralty action may be joined with a civil claim, for example, a claim based upon the Jones Act, see *Moragne*, 398 U. S., at 396 n. 12; *Peace* v. *Fidalgo Island Packing Co.*, 419 F. 2d 371 (CA9 1969), or a state survival statute, see *Dugas* v. *National Aircraft Corp.*, 438 F. 2d 1386 (CA3 1971), *Petition of Gulf Oil Corp.*, 172 F. Supp. 911 (SDNY 1959), cf. *Kernan* v. *American Dredging Co.*, 355 U. S. 426, 430 n. 4 (1958), and a jury trial may be requested.

[25] See, *e. g.*, *Young* v. *Pridd*, 3 Cro. Car. 89, 79 Eng. Rep. 679 (Ex. Ch. 1627); *Hyde* v. *Scyssor*, 2 Cro. Jac. 538, 79 Eng. Rep. 462 (K. B. 1619); *Mowry* v. *Chaney*, 43 Iowa 609 (1876); *Guevin* v. *Manchester St. R.*, 78 N. H. 289, 99 A. 298 (1916); Holbrook, The Change in the Meaning of Consortium, 22 Mich. L. Rev. 1 (1923); Lippman, The Breakdown of Consortium, 30 Col. L. Rev. 651 (1930); Note, Judicial Treatment of Negligent Invasion of Consortium, 61 Col. L. Rev. 1341 (1961). Damages for loss of consortium have been awarded by courts of admiralty as well. See *N. Y. & Long Branch Steamboat Co.* v. *Johnson*, 195 F. 740 (CA3 1912); 1 E. Benedict, Admiralty 366 (6th ed. 1940) ("When a

More recently, juries have been asked to measure loss of consortium suffered by wives whose husbands have been negligently harmed.[26] Relying on this history, the Florida Supreme Court recognized as early as 1899 that the damages for loss of society recovered by a wife for the wrongful death of her husband were "no more fanciful or speculative than the frugality, industry, usefulness, attention and tender solicitude of a wife [all of which a husband might recover at common law in an action for consortium], and the one can be compensated [as easily] by that simple standard of pecuniary loss . . . as the other." *Florida C. & P. R. Co.* v. *Foxworth*, 41 Fla. 1, 73, 25 So. 338, 348.

We are confident that the measure of damages for loss of society in a maritime wrongful-death action can "be left to turn mainly upon the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is a just compensation for the injuries inflicted." *The City of Panama*, 101 U. S. 453, 464 (1880). As in all damages awards for tortious injury, "[i]nsistence on mathematical precision would be illusory and the judge or juror must be allowed a fair latitude to make reasonable approximations guided by judgment and practical experience," *Whitaker* v. *Blidberg Rothchild Co.*, 296 F. 2d 554, 555 (CA4 1961). Moreover, appellate tribunals have amply demonstrated their ability to control excessive awards, see, *e. g.*, *Moore-McCormack Lines, Inc.* v. *Richardson*, 295 F. 2d 583 (CA2 1961); *Dugas* v. *National Aircraft Corp.*, 438 F. 2d 1386 (CA3 1971).

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personal injury to a wife is maritime by locality, her husband may recover his damages for loss of her services, loss of consortium, etc., in admiralty"). But see *Igneri* v. *Cie. de Transports Oceaniques*, 323 F. 2d 257 (CA2 1963).

[26] See, *e. g.*, *Hitaffer* v. *Argonne Co.*, 87 U. S. App. D. C. 57, 183 F. 2d 811 (1950); Prosser § 125, p. 895; Note, Judicial Treatment of Negligent Invasion of Consortium, 61 Col. L. Rev. 1341 (1961).

Finally, in addition to recovery for loss of support, services, and society, damages for funeral expenses may be awarded under the maritime wrongful-death remedy in circumstances where the decedent's dependents have either paid for the funeral or are liable for its payment. A majority of States provided for such recovery under their wrongful-death statutes.[27] Furthermore, although there is a conflict over whether funeral expenses are compensable under the Death on the High Seas Act, compare *The Culberson*, 61 F. 2d 194 (CA3 1932), with *Moore* v. *The O S Fram*, 226 F. Supp. 816 (SD Tex. 1963), aff'd, *sub nom. Wilhelm Seafoods, Inc.* v. *Moore*, 328 F. 2d 868 (CA5 1964), it is clear that funeral expenses were permitted under the general maritime law prior to *The Harrisburg*, see, *e. g.*, *Hollyday* v. *The David Reeves*, 12 F. Cas. 386 (No. 6,625) (Md. 1879). We therefore find no persuasive reason for not following the earlier admiralty rule and thus hold that funeral expenses are compensable.[28]

Turning now to Sea-Land's double-liability argument, we note that, in contrast to the elements of damages which we today hold may be recovered in a maritime wrongful-death action, the decedent recovered damages only for his loss of past and future wages, pain and suffering, and medical and incidental expenses. Obviously, the decedent's recovery did not include damages for the dependents' loss of services, society, and funeral expenses. Indeed, these losses—unique to the decedent's depend-

[27] See Speiser § 3.49; Comment, Wrongful Death Damages in North Carolina, 44 N. C. L. Rev. 402, 419–420 (1966).

[28] Funeral expenses have been awarded in post-*Moragne* wrongful-death actions. See, *e. g.*, *Greene* v. *Vantage S. S. Corp.*, 466 F. 2d 159 (CA4 1972); *Dennis* v. *Central Gulf S. S. Corp.*, 323 F. Supp. 943 (ED La. 1971), aff'd, 453 F. 2d 137 (CA5 1972); *Mascuilli* v. *United States*, 343 F. Supp. 439 (ED Pa. 1972); *In re Sincere Navigation Corp.*, 329 F. Supp. 652 (ED La. 1971).

ents—could not accrue until the decedent's death. Thus, recovery of damages for these losses in the maritime wrongful-death action will not subject Sea-Land to double liability or provide the dependents with a windfall.

There is, however, an apparent overlap between the decedent's recovery for loss of future wages and the dependents' subsequent claim for support.[29] In most instances, the dependents' support will derive, at least in part, from the decedent's wages. But, when a tortfeasor has already fully compensated the decedent, during his lifetime, for his loss of future wages, the tortfeasor should not be required to make further compensation in a subsequent wrongful-death suit for any portion of previously paid wages. Any potential for such double liability can be eliminated by the application of familiar principles of collateral estoppel to preclude a decedent's dependents from attempting to relitigate the issue of the support due from decedent's future wages.[30]

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[29] The Court of Appeals below recognized the potential problem of double recovery and committed "to the discretion of the trial court the task of making an appropriate deduction from or accommodation of any judgment to which Mrs. Gaudet might otherwise be entitled, to insure that no double recovery results. *Cf.* Billiot v. Sewart, 382 F. 2d 662 (5th Cir. 1967); Prosser, [Law of Torts,] at 934-935," 463 F. 2d, at 1333 n. 1. In our view, application of collateral estoppel principles makes resort to theories of setoff or recoupment generally unnecessary.

[30] If the dependents' total support received from the decedent exceeds the future wages paid to the decedent by the tort-feasor, the dependents will have an actionable cause for support against the tortfeasor for the difference. In that circumstance, if a special verdict was not rendered in the decedent's action specifying the amount of damages awarded for future wages, it may become necessary in the dependents' action to determine what portion of the decedent's lump-sum recovery for his injuries was attributable to future wages. This in no way conflicts with our holding that the dependents will be estopped from relitigating the amount of future

Collateral estoppel applies

> "where the second action between the same parties is upon a different cause or demand . . . . In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' *Cromwell* v. *County of Sac*, *supra*, 353. And see *Russell* v. *Place*, 94 U. S. 606; *Southern Pacific R. Co.* v. *United States*, 168 U. S. 1, 48; *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U. S. 661, 671. Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time. But matters which were actually litigated and determined in the first proceeding cannot later be relitigated." *Commissioner* v. *Sunnen*, 333 U. S. 591, 597–598 (1948).

And while the general rule is that nonparties to the first action are not bound by a judgment or resulting determination of issues, see *Blonder-Tongue* v. *University Foundation*, 402 U. S. 313, 320–327 (1971), several exceptions exist. The pertinent exception here is that nonparties may be collaterally estopped from relitigating issues necessarily decided in a suit brought by a party who acts as a fiduciary representative for the beneficial interest of the nonparties.[31] In such cases, "the bene-

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wages; it is merely an acknowledgment that the amount of the wage recovery in the first action may have to be clarified in the second.

[31] See Vestal, Preclusion/Res Judicata Variables: Parties, 50 Iowa L. Rev. 27, 63–64 (1964); Note, Developments in the Law—

ficiaries are bound by the judgment with respect to the interest which was the subject of the fiduciary relationship; they are . . . bound by the rules of collateral estoppel in suits upon different causes of action," F. James, Civil Procedure § 11.28, p. 592 (1965).

Under the prevailing American rule, a tort victim suing for damages for permanent injuries is permitted to base his recovery "on his prospective earnings for the balance of his life expectancy at the time of his injury *undiminished by any shortening of that expectancy as a result of the injury*," 2 F. Harper & F. James, The Law of Torts § 24.6, pp. 1293–1294 (1956) (emphasis in original).[32] Thus, when a decedent brings his own personal-injury action during his lifetime and recovers damages for his lost wages he acts in a fiduciary capacity to the extent that he represents his dependents' interest in that portion of his prospective earnings which, but for his wrongful death, they had a reasonable expectation of his providing for their support. Since the decedent's recovery of any future wages will normally be dependent upon his fully litigating that issue, we need not fear that

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Res Judicata, 65 Harv. L. Rev. 818, 855–856 (1952); Restatement of Judgments § 92 (1942) deals expressly with wrongful-death actions and provides that, even in cases where the wrongful-death action is not premised upon the decedent's having an extant cause of action for personal injuries at the time of his death, "the rules of res judicata apply in actions brought after his death as to issues litigated in an action brought by him and terminating in a judgment before his death," *id.*, comment on subsection (1).

[32] This rule appears to have been rejected in England in favor of compensating a personal-injury victim on the basis of his life expectancy *after* the accident. See *Oliver* v. *Ashman*, [1961] 3 W. L. R. 669 (C. A.); Fleming, The Lost Years: A Problem in the Computation and Distribution of Damages, 50 Calif. L. Rev. 598, 600 (1962). Under the English rule, the accident victim is not permitted to recover lost wages for the difference in years between his pre-accident and post-accident life expectancy.

applying principles of collateral estoppel to preclude the decedent's dependents' claim for a portion of those future wages will deprive the dependents of their day in court.

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST join, dissenting.

The Court today rewrites several areas of the admiralty law of wrongful death. In holding that a wrongful-death action may be brought although the decedent has previously recovered in his own suit based on the same wrongful act, the Court disregards a major body of maritime and state law. The majority opinion also opens up an area of sentimental damages that has not been allowed under traditional admiralty doctrine. It hopes to prevent double recovery through a novel application of collateral estoppel principles, which rests in turn on the unprecedented concept that a seriously injured person acts as a fiduciary for an undefined class of potential beneficiaries with regard to his *own* recovery in his *own* personal-injury action. Given the sweep of the majority's approach, the upshot in many areas will be a nearly total nullification of the congressional enactments previously governing maritime wrongful death. Except for a technical joinder of counts to obtain a jury trial and thus to maximize the benefits promised by the Court's opinion, no one entitled to rely on the admiralty doctrine of unseaworthiness will, after today, seek relief under the federal maritime wrongful-death statutes. Several limitations built into those congressional enactments have been swept aside by the majority's decision.

In reaching these results, the majority purports to apply *Moragne* v. *States Marine Lines,* 398 U. S.

375 (1970). It is true that *Moragne* overruled *The Harrisburg*, 119 U. S. 199 (1886), and held that an action for death caused by a violation of maritime duties would lie under the general law of admiralty. But *Moragne* does not support the Court's far-reaching holdings in this case. Indeed, *Moragne*, which was essentially a response to a gap in maritime remedies for deaths occurring in state territorial waters, explicitly counsels against the sort of *tabula rasa* restructuring of the law of admiralty undertaken by the majority. Writing for the Court, Mr. Justice Harlan stressed the need to "assure uniform vindication of federal policies . . . ." 398 U. S., at 401. He eschewed "the fashioning of a whole new body of federal law . . . ," *id.*, at 405, believing that the lower courts would have slight difficulty "in applying accepted maritime law to actions for wrongful death." *Id.*, at 406. He stated that those courts would find "persuasive analogy for guidance" in the accumulated experiences under the state wrongful-death statutes and the Death on the High Seas Act, 46 U. S. C. § 761 *et seq.*, 398 U. S., at 408. He emphasized the consistency of the Court's holding with the congressional purposes behind the Jones Act, 46 U. S. C. § 688. 398 U. S., at 400–402.

The Court has now rejected these guidelines so recently laid down in *Moragne*. Disregarding the source of law endorsed by *Moragne*, as well as the concern for uniformity expressed in that opinion, the Court has fashioned a new substantive right of recovery in conflict with "accepted maritime law" and a new body of law with regard to the elements of damages recoverable in admiralty wrongful-death actions. In my view, these unprecedented extensions of admiralty law exhibit little deference for *stare decisis* or, indeed, for enunciated congressional policy. I also believe these new doctrines are unsound as a matter of principle, will create difficulty

and confusion in the litigation of admiralty cases, and are very likely to result in duplicative recoveries.

I

Long accepted law under the Jones Act,[1] one of the two federal maritime wrongful-death statutes,[2] does not countenance the result reached by the majority today. The Jones Act "created a federal right of action for the wrongful death of a seaman based on the statutory action under the Federal Employers' Liability Act [FELA]." *Kernan* v. *American Dredging Co.*, 355 U. S. 426, 429 (1958). Since the FELA, 45 U. S. C. §§ 51–60, is the "régime which the Jones Act made applicable to seamen . . . ," [3] the "entire judicially developed doctrine of liability" under the FELA governs a Jones Act case.

[1] 46 U. S. C. § 688. The Jones Act provides:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

Since the Act employs the terms "in the course of his employment . . . ," the cause of action it provides "follows from the seaman's employment status and is not limited to injury or death occurring on the high seas." *Moragne* v. *States Marine Lines*, 398 U. S. 375, 394 (1970). Proof of negligence is a predicate to recovery. *Ibid.*

[2] The second such statute, the Death on the High Seas Act, is discussed below. See text, *infra*, at 599–601 and nn. 4–6.

[3] *Igneri* v. *Cie. de Transports Oceaniques*, 323 F. 2d 257, 266 (CA2 1963), cert. denied, 376 U. S. 949 (1964).

Kernan, supra, at 439. An uninterrupted line of FELA and Jones Act cases going back a half century holds that if the decedent reduces his claim to settlement or judgment prior to his death, or otherwise extinguishes his right to pursue the claim, no subsequent wrongful-death action may be brought. See, *e. g., Mellon* v. *Goodyear,* 277 U. S. 335 (1928); *Flynn* v. *New York, N. H. & H. R. Co.,* 283 U. S. 53 (1931); *Walrod* v. *Southern Pacific Co.,* 447 F. 2d 930 (CA9 1971); *Seaboard Air Line R. Co.* v. *Oliver,* 261 F. 1 (CA5 1919); *Gilmore* v. *Southern R. Co.,* 229 F. Supp. 198 (ED La. 1964); *Purvis* v. *Luckenbach S. S. Co.,* 93 F. Supp. 271 (SDNY 1949).

Mellon and its progeny hold unequivocally that a judgment, settlement, or similarly conclusive event with regard to the decedent's own right to seek recovery for his personal injuries "[precludes] any remedy by the personal representative based upon the same wrongful act." *Mellon, supra,* at 344. The Court in *Mellon* quoted with approval the following language from a state court opinion:

> "'"Whether the right of action is a transmitted right or an original right, whether it be created by a survival statute or by a statute creating an independent right, the general consensus of opinion seems to be that the gist and foundation of the right in all cases is the wrongful act, and that for such wrongful act but one recovery should be had, and that if the deceased had received satisfaction in his lifetime, either by settlement and adjustment or by adjudication in the courts, no further right of action existed."'" *Id.,* at 345. (Citation omitted.)

The *Mellon* rule does not rest on a disagreement in principle with the majority's view, *ante,* at 577–578, that a single wrong is capable of producing separate and distinct injuries, those to the decedent and those to his bene-

ficiaries. Indeed, the Court in *Mellon* explicitly recognized that distinction. It noted that although originating in the same wrongful act, there are two separate and distinct claims, one assertable by the injured person and the other upon his death by his personal representative or dependents. 277 U. S., at 340, 342. Nevertheless, *Mellon* and uniformly consistent Jones Act and FELA cases that have followed it hold that when the decedent extinguishes his own claim he simultaneously forecloses any wrongful-death action. As Mr. Justice Holmes put it for a unanimous Court in *Flynn, supra*, the wrongful-death action is "derivative and dependent upon the continuance of a right in the injured employee at the time of his death." 283 U. S., at 56 (citation omitted). Thus, the Court's opinion in this case creates a square conflict with one of the major bodies of maritime law that *Moragne* viewed as a source of guidance.

The Court's implication that the Death on the High Seas Act[4] supports its departure from *Mellon, ante*, at 583 n. 10, is at best conjectural. In fact, no cases addressing the situation presented here appear to have arisen under that Act. Conceivably such a case could arise, because the High Seas Act by its terms covers deaths caused by injuries inflicted at sea, not simply deaths occurring on the high seas. Cf. *Lacey* v. *L. W. Wiggins Airways, Inc.*, 95 F.

[4] 46 U. S. C. § 761 *et seq.* The opening section of the Death on the High Seas Act, 46 U. S. C. § 761, provides:

"Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued."

Supp. 916 (Mass. 1951).[5] Thus, it would be possible in theory for a person injured at sea to recover for his personal injuries and, following his death, for his survivors to attempt to bring suit under the High Seas Act. But certainly the Act would not be read as allowing the subsequent action. Such a result would conflict with the *Mellon* line of cases under the Jones Act and the FELA, producing precisely the lack of uniformity normally sought to be avoided in admiralty. Moreover, the High Seas Act contains a substitution provision, 46 U. S. C. § 765, that by implication forbids a wrongful-death action following a decedent's judgment. Section 765 provides that if a person who suffers injuries within the scope of the Act dies during the pendency of his own personal injury action, *that* action may be transformed by a personal representative into a wrongful-death action countenanced by the Act.[6] Surely this substitution provision evidences a congressional recog-

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[5] But see *Pickles* v. *F. Leyland & Co.*, 10 F. 2d 371 (Mass. 1925). *Pickles* holds that if the death occurs on land, the High Seas Act is not applicable, even though the injuries ultimately producing death were inflicted at sea. *Id.*, at 372. If this were the correct view, it would be easy to see why cases like the instant one had not previously arisen under the High Seas Act. The Act would simply not allow actions like the present one. However, the Act says "death . . . caused by wrongful act, neglect, or default occurring on the high seas . . . ," not "death occurring on the high seas." See n. 4, *supra*. *Pickles*, therefore, is probably an erroneous reading of the Act.

[6] Section 765 reads:

"If a person die as the result of such wrongful act, neglect, or default as is mentioned in section 761 of this title [see n. 4, *supra*] during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of [pecuniary losses]."

nition that only one action or the other should be allowed to proceed to judgment.

The Court's reference in *Moragne* to the "strong concern for uniformity" in admiralty law, 398 U. S., at 401, often repeated and often related to congressional policies underlying the Jones Act and the Death on the High Seas Act, *id.*, at 396 n. 12, 401–402, was not an expression of concern solely for intellectual consistency. "Such uniformity not only will further the concerns of both of the . . . Acts but also will give effect to the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.' *The Lottawanna*, 21 Wall. 558, 575 (1875)." *Id.*, at 401–402. But the lack of uniformity produced by the majority's holding should be evident. For example, whether a seaman's injuries occur on land or at sea will be determinative under the majority's approach. If on land, the seaman will have the Jones Act as his admiralty-related remedy.[7] Under that Act and the *Mellon* line of cases his own personal-injury action will foreclose a subsequent wrongful-death action—a misfortune that would not have befallen him and his survivors if only he had been lucky enough to have been injured at sea. This anomaly is not something, I suspect, the Court will long abide. Since "[i]t has been consistently true in this branch of the law that whatever a seaman can get under one theory he can sooner or later get under all the others . . . ,"[8] the Court's holding undoubtedly portends an express overruling of *Mellon* and its successors, cases that the Court bypasses today.

Aside from the disunity in the law of admiralty inherent in its opinion, I fail to see how the Court can square

[7] See n. 1, *supra*.

[8] G. Gilmore & C. Black, The Law of Admiralty 308 (1957).

its sweeping approach with *Moragne*'s reliance on and admonition to draw by analogy from the federal statutes. *E. g.*, 398 U. S., at 400–402, 408. *Moragne* envisioned a process of accommodation with those statutes, not their abrupt and near-total forced obsolescence. In this regard, it might be noted that the Court has still not resolved many of the practical questions left open in *Moragne*, such as how to define the class of beneficiaries or an appropriate limitation period. Presumably, in resolving such questions the lower courts are to continue to rely on the admiralty wrongful-death statutes. Now they are placed in the interesting position of analogizing to statutes under which the very claim before them would be blocked.

II

The Court in *Moragne* also counseled the lower courts to draw by analogy from the case law under the state wrongful-death statutes. 398 U. S., at 408. Under the great majority of those statutes, whether of survival or true death act character, Mrs. Gaudet's cause of action would have been foreclosed by her husband's recovery.[9]

[9] *E. g.*, *Roberts* v. *Union Carbide Corp.*, 415 F. 2d 474 (CA3 1969) (New Jersey law); *Schlavick* v. *Manhattan Brewing Co.*, 103 F. Supp. 744 (ND Ill. 1952) (Indiana law). The cases are reviewed in W. Prosser, The Law of Torts 911–912 (4th ed. 1971) (hereafter Prosser); 2 F. Harper & F. James, The Law of Torts § 24.6 (1956 and Supp. 1968); Fleming, The Lost Years: A Problem in the Computation and Distribution of Damages, 50 Calif. L. Rev. 598, 599, 608–609 (1962) (hereafter Fleming). The latter commentator notes that "[a]t least twenty-three jurisdictions . . . have so held in the clearest terms and some half a dozen more have so indicated in dicta." *Id.*, at 608–609, n. 38. Nine or 10 contrary jurisdictions constitute a "substantial minority view" according to Prosser 912 and nn. 35–39. However, Prosser notes that this view is "largely confined to jurisdictions which do not allow the decedent to recover for his own curtailed life . . . ." *Id.*, at 912. As the Court points out, *ante*, at 594, the *Moragne* cause of action is not subject to that limitation.

The Restatement of Torts is also in direct conflict with the position taken by the Court:

> "Although the death statutes create a new cause of action, both they and the survival statutes are dependent upon the rights of the deceased. Hence where no action could have been brought by the deceased had he not been killed, no right of action exists. Likewise a release by the deceased or a judgment either in his favor or, if won on the merits, in favor of the defendant, bars an action after his death. . . . " [10]

Because of the likelihood of double recovery and the threat to repose inherent in the majority's holding, several leading commentators also favor the majority rule under the state wrongful-death statutes.[11] This is

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[10] Restatement of Torts, Explanatory Notes § 925, comment *a*, p. 639 (1939). This position is repeated almost verbatim in the most recent working draft of the second Restatement. See Restatement (Second) of Torts, Explanatory Notes § 925, comment *a*, p. 196 (Tent. Draft No. 19, Mar. 30, 1973). See also, Restatement of Torts, Explanatory Notes § 926, comment *a*, p. 646:

"[In those states with statutes combining the functions of a death statute and a survival statute] the representatives of the deceased can recover in a single action both for the damages preceding death and for those caused by the death. Even in such States, however, a judgment obtained by the deceased or a release of the cause of action by him terminates the right of action."

Accord, Restatement (Second) of Torts, Explanatory Notes § 926, comment *a*, p. 204. See also, *id.*, Explanatory Notes § 925, comment *i*, p. 199:

"[A] release of his claim by the injured person bars an action after his death for causing the death, as also does a judgment either for, or if on the merits, against him given in an action brought by him for the tort."

[11] *E. g.*, 2 Harper & James, *supra*, at 1293–1294:

"If . . . deceased recovers before his death, his recovery for permanent injuries will be based, under the prevailing American rule, on

particularly true where, as here, the deceased in his own action has recovered his loss of earnings over his pre-accident life expectancy.[12] Even those opposed to the majority position under state law recognize the "force" of that view in such a case.[13]

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his prospective earnings for the balance of his life expectancy at the time of his injury *undiminished by any shortening of that expectancy as a result of the injury*. Presumably any settlement would reflect the legal liability under this rule. The danger of double recovery becomes clear when it is recalled that any benefits of which the survivors were deprived, by the death, would have come out of these very prospective earnings if deceased had lived. At least in the case of serious and apparently permanent injuries, therefore, there is real danger of double recovery if a wrongful death action is allowed after recovery or release by deceased during his lifetime." (Emphasis in original; citations omitted.)

See *id.*, at n. 14: "[Double recovery] is a 'theoretical' as well as a 'practical' danger. . . . The prevailing rules . . . seem therefore to be fully justified." (Citation omitted.) See also Prosser 911: "The courts undoubtedly have been influenced by a fear of double recovery. This is of course possible in point of law, not only under the survival type of death act, but also in any jurisdiction where the decedent would be allowed to recover for the prospective earnings lost through his diminished life expectancy." (Citations omitted.) The latter appears to have been the measure of Mr. Gaudet's recovery in his personal injury action. 463 F. 2d 1331, 1333 n. 1; Tr. of Oral Arg. 20–21.

[12] *E. g.*, Duffey, The Maldistribution of Damages in Wrongful Death, 19 Ohio St. L. J. 264, 273 (1958): In such cases, "[t]he recovery in the wrongful death action based on the decedent's future earning capacity is . . . simply a portion or segment of the larger recovery obtained by the injured person himself in the personal injury action." See n. 11, *supra*.

[13] Fleming 610. "[The fear of duplication of damages] has force . . . whenever allowance was made for prospective loss of earnings [in the decedent's own lawsuit], since this would have drawn on, or depleted, the fund contingently available to satisfy the dependants for loss of their expectancy of support." This commentator also states that the minority of state courts that do not view decedent recovery as a bar to a subsequent wrongful-death action and that

III

The Court devotes a major portion of its opinion to the elements of damages recoverable under *Moragne*. *Ante*, at 584–591. In particular, the Court embraces the Court of Appeals' suggestion, 463 F. 2d 1331, 1333 (CA5 1972), that Mrs. Gaudet is entitled to seek damages for loss of "society," including love, affection, care, attention, companionship, comfort, and protection. *Ante*, at 585–590. Although I would not otherwise address the question of damages because I believe that no cause of action exists here, I think it important to note that the Court's holding that loss of society may be recovered is a clear example of the majority's repudiation of the congressional purposes expressed in the two federal maritime wrongful-death statutes.[14] The traditional admiralty view is that such nonpecuniary damages are not recoverable under the Death on the High Seas Act and the Jones Act.

The Death on the High Seas Act by its terms restricts recovery to pecuniary losses,[15] a restriction the lower

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are "content with the bland assertion that no duplication of damages can arise because the release or recovery by the decedent *could not* have covered the period beyond his death . . ." are relying on a "protestation of faith rather than a conclusion drawn from proven facts . . . ." *Id.*, at 615 (emphasis in original).

[14] I do not address the correctness of the Court's holding that *Moragne* allows the recovery of loss of services, see, *e. g.*, *Michigan C. R. Co.* v. *Vreeland*, 227 U. S. 59, 71, 73 (1913), or funeral expenses. Compare *Cities Service Oil Co.* v. *Launey*, 403 F. 2d 537, 540 (CA5 1968), with *Greene* v. *Vantage S. S. Corp.*, 466 F. 2d 159, 167 (CA4 1972).

[15] 46 U. S. C. § 762. Section 762 provides:

"The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought."

federal courts have consistently read as excluding loss of consortium and similar nonpecuniary injuries to personal relationship, affections, and sentiments.[16] Because of its relationship to the FELA and its overlapping coverage with the Death on the High Seas Act, the Jones Act also has been read as forbidding recovery of the sentimental losses approved by the Court today.[17] Moreover, these well-established damages principles under the two federal maritime wrongful-death statutes, coupled with a concern for uniformity in admiralty law, have led most lower courts that have taken part in the continuing development of the *Moragne* cause of action to conclude that the affection-related damages endorsed by the Court are not recoverable under *Moragne*.[18] These courts have

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[16] *E. g., Igneri* v. *Cie. de Transports Oceaniques*, 323 F. 2d, at 266 n. 21, cert. denied, 376 U. S. 949 (1964); *Middleton* v. *Luckenbach S. S. Co.*, 70 F. 2d 326, 330 (CA2), cert. denied, 293 U. S. 577 (1934). See *Dugas* v. *National Aircraft Corp.*, 438 F. 2d 1386, 1392 (CA3 1971) ("The amount of recovery under the Death on the High Seas Act is determined by the actual pecuniary loss sustained by the beneficiary due to the wrongful death").

[17] *E. g., Igneri* v. *Cie. de Transports Oceaniques, supra*, at 266 ("[I]t is established . . . that the damages recoverable by a seaman's widow suing for wrongful death under the Jones Act do not include recovery for loss of consortium"). Cf. *Cities Service Oil Co.* v. *Launey, supra*, at 540. See *Gulf, C. & S. F. R. Co.* v. *McGinnis*, 228 U. S. 173, 175 (1913); *Michigan C. R. Co.* v. *Vreeland, supra*, at 68, 70–71; G. Gilmore & C. Black, The Law of Admiralty 306 (1957): "Recovery under the High Seas Act like that under FELA § 51 [and thus the Jones Act] is based on pecuniary loss to the beneficiaries as a result of the wrongful death. The damage calculation therefore involves an estimate of what the decedent's life expectancy would have been, his probable earnings during that period and the amounts he would have contributed to beneficiaries."

[18] *E. g., Simpson* v. *Knutsen*, 444 F. 2d 523 (CA9 1971); *Petition of United States Steel Corp.*, 436 F. 2d 1256, 1279 (CA6 1970), cert. denied, 402 U. S. 987 (1971); *In re Cambria S. S. Co.*, 353 F. Supp. 691, 697–698 (ND Ohio 1973); *Green* v. *Ross*, 338 F. Supp.

heeded *Moragne*'s admonition not to fashion a whole new body of law, yet their holdings are disapproved by the majority. *Ante*, at 588 n. 23.

IV

The reasons underlying the extensive state and admiralty precedent contrary to the Court's holding that this action may be brought are not difficult to discern. The majority's statement that this precedent rests not so much on policy as on "statutory limitations on the wrongful-death action . . . ," *ante*, at 579, is erroneous.[19] The

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365, 367 (SD Fla. 1972); *Petition of Canal Barge Co.*, 323 F. Supp. 805, 820–821 (ND Miss. 1971). The state courts of Louisiana, the State where Mr. Gaudet's injuries occurred, have reached the same result. *Strickland* v. *Nutt*, 264 So. 2d 317, 322 (La. App.), aff'd *sub nom. DeRouen* v. *Nutt*, 262 La. 1123, 266 So. 2d 432 (1972). ("The *Moragne* case, with the desire for uniformity in maritime death actions announced therein, precludes loss of love and affection as an element of damage here.")

Only one Fifth Circuit case, other than the instant case, and two cases from the United States District Court for the Eastern District of Louisiana have concluded that *Moragne* signaled a break with settled admiralty wrongful-death damages rules. *Dennis* v. *Central Gulf S. S. Corp.*, 453 F. 2d 137, cert. denied, 409 U. S. 948 (1972); *In re Farrell Lines, Inc.*, 339 F. Supp. 91 (1971); *In re Sincere Navigation Corp.*, 329 F. Supp. 652 (1971). In the latter case, the court candidly admitted that its decision:

"may conflict with *Moragne's* goal of uniformity of recovery for all who perish on navigable waters." *Id.*, at 657.

[19] The majority's opinion, apparently in an effort to avoid the force of precedent contrary to its view, contrasts disparagingly these statutes with the more "humane" judge-made rule of *Moragne*. *Ante*, at 581–583. But the majority ignores the extent to which the Court in *Moragne* expressly identified its holding with the policy and principles of the very statutes now criticized:

"The policy thus established [by the state and federal wrongful-death statutes] has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction

large number of courts that have refused to adopt the majority's view have done so for very good, practical reasons. The Court has adopted a rule that will be difficult to administer, that presents a serious risk of unfairness for those in petitioner's position, and that fails to foster the law's normal regard for finality.

The majority's position requires it to establish procedures to prevent a double recovery of the elements of damages awarded Gaudet in his own lawsuit. This is no easy task, as "[i]t should be obvious that as yet no satisfactory systematic solution to the whole [double recovery] problem has been found." [20] The Court adopts a collateral estoppel theory, and apparently would implement this by treating the injured seaman as a "fiduciary" for his dependents. *Ante*, at 593–594. Apart from the utter novelty of this extension of the law of trusts and fiduciary duties, the majority's estoppel theory is hardly a "satisfactory solution" to the problem of unfair recoveries.[21] Apparently the Court intends to limit the ele-

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but also in those of decisional law." 398 U. S., at 390–391. And, again:

"Both the Death on the High Seas Act and the numerous state wrongful-death acts have been implemented with success for decades. The experience thus built up counsels that a suit for wrongful death raises no problems unlike those that have long been grist for the judicial mill." *Id.*, at 408.

Contrary to the Court's intimations, there is no basis for suggesting a tension between these statutes and *Moragne*. Indeed, it is clear from the *Moragne* opinion that the Court relied upon the statutes in its analysis, sought only to fill a narrow gap in the law left by them, and considered that the statutes afforded "persuasive analogy for guidance" in developing the *Moragne* cause of action. *Ibid.*

[20] Prosser 912 (footnote omitted).

[21] The theory probably creates more problems than it resolves. What are the boundaries of the class of potential beneficiaries who are estopped to relitigate loss of support? If a seriously injured person is the fiduciary for an undefined class of potential beneficiaries, may he be enjoined from wasting his assets or disinheriting members

ments of proof of damages that may be introduced at the second trial. But this will in no way guarantee that the second trier of fact will succeed in compartmentalizing the allowable from the unallowable elements of damages in the second trial. The highly conceptualized nature of the parsing of categories of damages undertaken by the Court suggests how unlikely it is that the majority's theoretical distinctions will be meaningful in practice. And control by way of appellate review of the injustices that are bound to occur will be, practically speaking, an impossible task.

Mr. Gaudet's judgment was given by a jury. It would be unrealistic to assume that that verdict was restricted to an objective measurement of Gaudet's lost earnings plus the "value" of his pain and suffering. In all likelihood, Gaudet's award reflected an element of the jury's concern for a permanently disabled working man. As anyone who has tried jury cases knows, jury sympathy commonly overcomes a theoretical inability to recover for such intangibles as loss of society. If Mrs. Gaudet is then allowed to recover in her subsequent lawsuit the full value, whatever that is, of her loss of love, attention, care, affection, companionship, comfort, and protection, she will be given a second opportunity to benefit from the imprecision built into any award for injuries that cannot be measured objectively. The Gaudet family may well then receive substantially more than just compensation for its injuries.

One expression of jury sympathy is commonplace, despite its conflict with the damages principles that in theory control. But certainly two opportunities for

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of his family? There will also be some nice questions under the majority's approach about whether a particular item of proof at the second trial is to be introduced with regard to the forbidden issue of support or the permissible issue of, say, services.

jury sentiment cross the line between benignity and bonanza and should not be sanctioned. And, it is in those cases where the decedent's suit and the subsequent *Moragne* wrongful-death action are both tried to juries that the majority's procedures for preventing windfall are most likely to break down. Since it is an admiralty action, a *Moragne* claim by itself will not entitle the wrongful-death claimant to a jury. But there will be cases in which the claimant will be able to join a state law action to a *Moragne* claim and obtain a jury for both, either in state or federal court. See, *ante*, at 589 n. 24. When that happens, those in petitioner's position will be subjected twice to the vagaries of a jury, the second time on such wide-open damages concepts as those embraced by the majority.

The Court's approval of a second recovery based on the same wrong for which decedent already had recovered, compounded by its rejection of traditional admiralty "pecuniary loss" damage standards, seems particularly inappropriate given the nature of the claim relied on by both Gaudets. The maritime concept of unseaworthiness is not based on fault. The doctrine has evolved into a judicially created form of strict liability.[22] When the law imposes absolute liability, it often restricts recovery to damages for those injuries that are clearly ascertainable and susceptible of monetary compensation. *E. g., Igneri* v. *Cie. de Transports Oceaniques*, 323 F. 2d 257, 268 (CA2 1963), cert. denied, 376 U. S. 949 (1964). This reflects the impossibility of deterrence and the inappropriateness of punishment in many cases where liability is absolute. The Court has broken with that wise rule of social policy in this case.

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[22] *Moragne* v. *States Marine Lines*, 398 U. S., at 399. Cf., Comment, Maritime Wrongful Death After *Moragne:* The Seaman's Legal Lifeboat, 59 Geo. L. J. 1411 n. 4 (1971).

The Court also has ignored the law's normal regard for an end to duplicative litigation arising from the same transaction. After her husband's judgment was affirmed on appeal,[23] Mrs. Gaudet commenced this action by, in essence, changing a few lines in her husband's complaint and filing it again in the same United States District Court as a *Moragne* wrongful-death action. That court's dismissal of Mrs. Gaudet's complaint on *res judicata* grounds[24] is hardly surprising, given the striking similarities between the two Gaudet complaints. Both complaints were based on the maritime doctrine of unseaworthiness, a condition that Mrs. Gaudet alleged was established as a matter of *res judicata* by Mr. Gaudet's successful lawsuit. App. 2, 5–6. The same facts and injuries were alleged. *Id.*, at 1–2, 4–5. Both sought recovery, in the amount of $250,000. *Id.*, at 2, 6. Whereas Mr. Gaudet had sought recovery for lost earnings, *id.*, at 2, Mrs. Gaudet sought compensation for her "severe financial loss." *Id.*, at 5. Thus, on the face of the complaints, Mrs. Gaudet apparently sought recovery solely for elements of damages that had been encompassed by her husband's judgment.[25]

There should be strong reasons of policy to justify such repetitive suits and to impose on petitioner the attendant doubling of litigation expenses. The reasons advanced by the majority opinion do not, in my view, approach that level of persuasion. Petitioner has already fully litigated, and paid, a large judgment com-

[23] *Stein* v. *Sea-Land Services, Inc.*, 440 F. 2d 1181 (CA5 1971). It might be noted that because Gaudet's death intervened between the jury verdict and the appeal, his recovery went directly to his estate, not to him personally.

[24] Petition for Certiorari 17.

[25] Although the majority fails to address the point, presumably its result means that Mrs. Gaudet must at least amend her complaint upon remand to the District Court.

pensating Gaudet's estate for the injuries Gaudet incurred on board its vessel. Ordinarily, petitioner would have been able to consider the case closed and to order its affairs on the basis of a verdict affirmed on appeal. Today's result deprives petitioner of that reliance interest, subjecting it to another round of litigation with wide-open damages possibilities. The admiralty precedents, the prevailing weight of state law, and elementary fairness call for relieving petitioner of that unjustifiable burden.

As noted at the outset of this dissent, the Court has written new admiralty law as to the right of survivors to recover for wrongful death and has expanded significantly the elements of damages recoverable. In reaching these results, the majority opinion has discredited, if not in substance overruled, the unanimous decisions of the Court in the *Mellon* and *Flynn* cases. In *Moragne*, a decision on which I believe the majority places a mistaken reliance, the Court emphasized its reluctance to disregard or overrule established precedent:

> "Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors." 398 U. S., at 403.

Mr. Justice Harlan, for the Court, then went on to state with care the reasons for rejecting *The Harrisburg*

rule, described as an "unjustifiable anomaly." *Id.*, at 404. The substantive rule rejected today is no comparable anomaly. It has been the generally applied doctrine since wrongful-death actions were introduced in this country. It has been the rule of the relevant federal statutes since their inception, and Congress has not modified the rule during that entire period. It was the rule announced in *Mellon* and *Flynn, supra,* cases the Court chooses not to follow today. And, unlike the opinion in *Moragne,* the majority has not provided, in my view, sound reasons of precedent or policy for overturning the rule.